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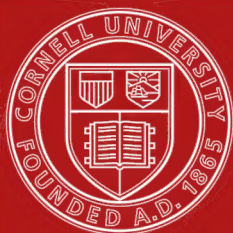
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A TREATISE

ON THE LAW OF

ATTACHMENTS, GARNISHMENTS
JUDGMENTS, AND EXECUTIONS.

TO WHICH IS APPENDED A COLLECTION OF LEADING AND
ILLUSTRATIVE CASES WITH NOTES.

FOR LAWYERS AND STUDENTS.

BY

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"ROOD ON GARNISHMENT," "COMMON REMEDIAL
PROCESSES," ETC

Judicium quasi juris dictum. Juris effectus in executione consistit.

GEO. WAHR, PUBLISHER AND BOOKSELLER,
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PREFACE.

This book is composed of two parts. The first is a text, divided into two hundred and twenty-five sections, tracing the progress of attachment and garnishment causes from beginning to end, and of all causes from verdict on. The second part is a collection of decisions upon the matters treated in the text.

The text is not claimed to be exhaustive upon any point. To make it so would defeat the very purpose for which it was written. A tree is not complete without all its foliage, but the outline of the branches cannot be clearly seen till the leaves have fallen. In the present discussion, details have been similarly omitted so that the more important matters can be seen. Anson on Contracts may be said to cover all the matters treated in the elaborate works on particular contracts, such as sales, agency, partnership, suretyship, deeds, mortgages, etc. In like manner, this manual is intended to explain all the matters covered by the extensive treatises on jurisdiction, judgments, *res judicata*, attachment, garnishment, and executions. It is not designed to trespass on the field occupied by any of these books, but to give what none of them do or can—a clear outline of the whole, without that cloud of details and the confusing review of inconsistent decisions upon them, which the writer of a complete text must give. In this way, it is hoped that a comprehensive view of broad fundamental principles may be obtained, with a clear vision of the relations between each part and all the others, and of the successive steps in each proceeding from beginning to end.

While this text states only the most elementary rules, it is believed that the man who has thoroughly mastered them can more than cope with one who is burdened with a weight of half digested matter. It is hoped that lawyers of long experience may find this outline of use in suggesting questions which their mem-

ory unaided would not recall, and for which they have not time to wade through a long treatise. To aid in this direction, the whole has been very carefully indexed and supplied with a complete table of cases cited. The selected cases support most of the propositions in the text, and are cited under them. The promiscuous citation of decisions on minor matters is purposely avoided; but for the convenience of those who may wish to investigate any question in detail, standard treatises are constantly cited in which the decisions will be found reviewed at length. Besides these, several hundred leading cases not found in the collection appended to this treatise, are cited under the propositions which they establish.

Enough has been told of the plan and purpose of this volume. It is not for me to judge of the success with which they have been executed. But a fair critic will surely pardon me for saying that the work has not been hastily done. Beginning with such advantage as was acquired by writing books on parts of the present subject, I have given this book my attention and labor constantly since I began teaching the subject here; and many changes have been made because of the impression which certain methods of presentation were observed to make on the minds of the students.

JOHN R. ROOD.

Ann Arbor, Mich., Dec. 3, 1901.

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TEXT.

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 1. DEFINITIONS AND DISTINCTIONS, §§ 6-13—Cases pp. 3-13.
 2. JURISDICTIONAL REQUISITES, §§ 14-46—Cases pp. 13-77.
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6. SATISFACTION OF JUDGMENTS, §§ 90-225—Cases pp. 137-514.
 - A. PROCESSES TO OBTAIN SATISFACTION, §§ 91-212—Cases pp. 137-487.
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 - B. WHAT CONSTITUTES A SATISFACTION, §§ 213-221—Cases pp. 488-504.
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INTRODUCTION.

Outline of Law, § 1.

Groups of Adjective Law, § 2.

What Works Treat of Each Group, § 3.

Scope of This Treatise, § 4.

Plan of Treatment, § 5.

Outline of Law.

§ 1. On beginning this study, let us take our latitude and longitude. In his universally admired commentaries, designed to cover the whole field of the municipal laws of England, Sir William Blackstone considered: 1, the general *nature* of the laws; and 2, the *object* of laws, or their subject-matter. The student will remember that the object of all municipal laws is either: 1, the ascertainment of *rights*, their nature, under what circumstances they exist, and how they are acquired and lost; or, 2, of violations of those rights and the recognition or establishment of *remedies* therefor. Herein, we will give attention principally to questions arising in the use of these remedies.

Groups of Adjective Law.

§ 2. All of the questions that can arise out of the pursuit of remedies in the courts may properly be considered in one or another of the following groups: 1, the process and service of it to commence the action, and the pleadings to reach an issue; 2, the trial of that issue, and proceedings to obtain a new trial, involving, 3, the rules governing the production and use of evidence to establish the claim; 4, the judgment of the law pronounced by the court; and, 5, proceedings to carry that judgment into effect.

What Works Treat of Each Group.

§ 3. The questions falling within the first two of these groups are usually treated in works on pleading and practice; the third, in treatises on evidence; the fourth, in treatises on judgments; and the questions falling within the last group have usually been considered separately in treatises on attachments, garnishments, and executions.

Scope of this Treatise.

§ 4. I shall presume that the reader of the following pages is fully prepared upon the questions falling within the first three of these groups, and is now ready to proceed to the investigation of those questions which arise after verdict, or in some ancillary proceeding previously instituted in anticipation of the judgment and with a view to provide means of rendering effectual whatever judgment might finally be obtained. Our theme will, therefore, be of judgments and the means of enforcing them.

Plan of Treatment.

§ 5. To some it might seem necessary to consider some of the means of enforcing judgments—such as attachments and garnishments—before treating of the judgments themselves; since these means of enforcement are set in motion before the judgment is obtained, and usually at the commencement of the action. But I am convinced that the general principles underlying all, and the questions commonly arising in the use of all, of the means of enforcement are so nearly the same, that it is best to depart slightly from the natural order of sequence by considering all the means of enforcement together in treating of the satisfaction of judgments. I shall, therefore, treat our whole subject under the title of judgments, as follows: 1, nature; 2, kinds; 3, record; 4, modification; 5, effect; and, 6, satisfaction. This scheme of treatment must be mastered if the student would hope to understand this treatise, for the matter is herein presented under this plan.

1. NATURE AND ESSENTIALS OF JUDGMENTS.

Definitions and Distinctions, §§ 6-13.

- Definitions, §§ 6, 7.
- Orders Distinguished, § 8.
- Neither Major nor Minor but Conclusion, § 9.
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- By the Court, § 14.
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- Facts Essential to Jurisdiction of the Thing, § 16.
- Judgments *in personam* on Substituted Service, § 17.
- Necessity of Service to Validity of Judgments *in rem*, § 18.
- Effect of Denial of Right to Hearing in Either Case, § 19.
- Effect of Acts of the Parties or of Other Courts, § 20.
- Effect of Irregularity, § 21.
- How Jurisdictional Questions May be Raised, § 22.
- True Criterion of Validity on Collateral Attack, §§ 23-30.
- Whether Irregularities Should Avoid Collaterally, §§ 31-45.
- Summary of Essentials of Judgments, § 46.

Judgments Defined.

Judgments are the Sentence of the Law Pronounced by the Court upon the Matters Contained in the Record.¹

§ 6. This is Blackstone's definition, which has been frequently quoted with approval. Several other definitions are given below, many of them very good and better adapted for imparting information than his; but his is chosen for our pur-

¹3 Bl. Com. 395.

TREATISES ON JUDGMENTS. Judgments, A. C. Freeman, 4th ed., 2 vols., 1892, Bancroft, Whitney & Co., San Francisco; Judgments, H. C. Black, 2 vols., 1891, West Pub. Co., St. Paul; Legal Judgments, J. Ram, 1 vol., Eng., Amer. ed. by J. Townsend, 1871, Baker, Voorheis & Co., New York; Foreign Judgments, F. T. Piggott, 1 vol., Eng., 1884, Wm. Clowes & Sons, London; Executions and Judgments, P. Bingham, Eng., 2d ed., 1 vol., 1835, 13 Law Library; Judgments, J. W. Carleton, 1 vol., Irish, 1844. See also numerous articles in Am. & Eng. Ency. Law, and Ency. Pl. & Pr., and many excellent treatises on parts of the subject mentioned later as we come to deal with those topics. Black and Freeman are both held in high favor by the bar, but Mr. Freeman's long training in this particular line gives his work the preference.

poses, because it is believed to embrace in legal parlance the substance of all the others; and, moreover, it is short, and exceedingly suitable for discussion in detail, to which let us now proceed.

§ 7. OTHER DEFINITIONS. The decision, or sentence of the law, pronounced by a court or other competent tribunal, upon the matter contained in the record.²

The decision, or sentence of the law, given by a court of justice, as the result of proceedings instituted for the redress of injury.³

The decision or sentence of the law, given by a court of justice or other competent tribunal, as the result of proceedings instituted therein for the redress of an injury.⁴

The determination or sentence of the law, pronounced by a competent judge or court, affirming that, upon the matters submitted for its decision, a legal duty or liability does or does not exist.⁵

The determination of some judicial tribunal created by law for the administration of public justice according to law, and is in strictness the determination of the law.⁶

An adjudication of the rights of the parties in respect to the claim involved.⁷

The final consideration and determination of a court of competent jurisdiction upon the matters submitted to it.⁸

The conclusion of law upon facts found or admitted by the parties, or upon their default in the course of a suit.⁸²

The decision of a controversy, given by a court of justice, between parties who do not agree.⁹

The end of the law in regard to the controversy.¹

²Freeman on Judgments § 2.

³11 Petersdorf Abr. 641, title, judgment; *Blaikie v. Griswold*, 10 Wis. 299.

⁴Bouvier Law Dic.

⁵Black on Judgments § 1.

⁶*Blood v. Bates*, 31 Vt. 150.

⁷*McNulty v. Hurd*, 72 N. Y. 521.

⁸*Whitwell v. Emory*, 3 Mich. 84; 59 Am. Dec. 220.

⁸²*Tidd Pr.* 930.

⁹*Union Bank v. Marin*, 3 La. An. 34.

¹*Blystone v. Blystone*, 51 Pa. St. 373.

The very voyce of law and right.²

It is the final adjudication of a civil action,—not the resolve or decree of the court, but the sentence of the law pronounced by the court in the action or question before it.³

Orders Distinguished.

§ 8. Blackstone's definition expresses more than appears at first blush. He says the judgment is the sentence because it should be distinguished from the numerous orders that may be made during the progress of the cause, or after judgment, such as adjournments, orders to give security for payment of costs, and the like; which are not judgments in the strict sense, but only orders, though they are sometimes called interlocutory judgments.⁴ In several of the states orders that judgment be so and so have been held not to be judgments, but only directions to the clerk to enter judgment; and on this technical distinction appeals have been dismissed, executions quashed, and proceedings thereon held void on collateral attack.

Neither the Major nor the Minor, but the Conclusion.

§ 9. Judgments are the sentence, the determination, the conclusion, which stated in a syllogism, of which the law and the facts make the other members, would look like this: 1, (the law) he who assaults and beats another is liable to the injured party for full compensation in money; 2, (the facts) A, the defendant, assaulted and beat B, the plaintiff, and \$50 would be full compensation; 3, (the judgment) it is therefore considered by the court, that the said plaintiff do recover of the said defendant the said sum, etc.⁵ The findings of law by the court do not constitute the judgment, but only the first proposition of the syllogism of which the judgment is the last.⁶ Again, the finding of facts when made by the court is no more

²Coke Litt. 39a.

³Zeigler v. Vance, 3 Iowa 528.

⁴Loring v. Illsley, 1 Cal. 24; Wakefield v. Moore, 65 Ga. 268.

⁵3 Blackstone's Com. 396; Black on Judgments § 1.

⁶Judgments, 11 Ency. Pl. & Pr. 828.

the judgment than is the verdict of a jury, but is only the second proposition of the syllogism.⁷ The judgment is the final proposition, the sentence.

The Opinion Distinguished.

§ 10. The judgment is the sentence; that is, the sentence is the judgment. The reasons given for rendering a judgment and the opinion of the court filed with the judgment are no part of it; and, therefore, the parties are not concluded thereby from contesting such matters in another action.⁸ If the record speaks in language free from ambiguity its effect cannot be qualified by anything stated in the opinion.⁹

Not a Contract.

§ 11. Speaking of judgments as sentences also reminds us that they arise from the edict of the law, not from the consent of the parties, which distinguishes them from contracts. A judgment is a sentence, not a contract. No consideration is necessary to make it enforceable, and it is not based upon any supposed capacity to contract or consent of the parties. The states are forbidden by the United States Constitution to pass any law impairing the obligation of contracts, and the fact that the contract has been reduced to judgment does not enable the states to impair the new obligation.¹ But a judgment for a tort has several times been held by the Supreme Court of the United States not to be within the protection of the constitutional prohibition, and the states may pass laws impairing its obligation. "Judgments for torts are usually

⁷State v. Brown, 44 Ind. 329. Therefore, an execution issued on the verdict without judgment was quashed on motion. *Truett v. Legg*, 32 Md. 147.

⁸*Burke v. Laforge*, 12 Cal. 403; *Davidson v. Carroll*, 23 La. An. 108. Opinions given by the Supreme Court to the governor or legislature on request are not judgments but mere opinions, and bind no one, not even the courts giving them. *Reply of the Judges*, 33 Conn. 586, In Re Chapter 6, 8 S. Dak. 274, 66 N. W. 310.

⁹*New Orleans M. C. R. Co. v. City of New Orleans*, 14 Fed. Rep. 373, 376; *Keane v. Fisher*, 10 La. An. 261.

¹*Freeman on Judgments*, § 4; *Black on Judgments* § 11.

the result of violent contests, and as observed by the court below, are imposed upon the losing party by a higher authority against his will and protest. The prohibition of the Federal Constitution was intended to secure the observance of good faith in the stipulation of the parties, against any state action. Where a transaction is not based upon any assent of the parties it cannot be said that any faith is pledged with respect to it."² Yet statutes with reference to contracts are often with justice held to extend to judgments, as being embraced in the legislative intent.³

The Record Distinguished.

§ 12. The judgment is the sentence of the law pronounced. The pronouncement from the bench is very informal, merely indicating the nature of the judgment given; and it is the duty of the attorney for the successful party to prepare the formal draft where a formal record of each case is made up and filed.⁴ Though pronounced by the court, judgments are recorded by the clerk of the court;⁵ and it often seems as though the judgment is not the sentence of the law pronounced by the court, but the record of that sentence as made by the clerk. For, till the record is made there is, according to the opinion of many courts, nothing to support a writ of error to reverse the judgment,⁶ nor execution to enforce it.⁷ Ordinarily it can speak but by the record, the only competent proof of it.⁸ A rule which generally prevails is that in other pro-

²Freeland v. Williams, 131 U. S. 405, 414.

³Freeman on Judgments § 4; Black on Judgments § 7.

⁴Stephen Pl. 112; Jasper v. Schlessinger, cases 3.

⁵Tidd Pr. 930; Black on Judgments § 110; Freeman on Judgments § 40.

A judgment record entered by plaintiff's attorney by direction of the court is valid. Tift v. Keaton, 78 Ga. 235.

⁶Onderdonk v. San Francisco, 75 Cal. 534; Sedgwick v. Dawkins, 17 Fla. 811; Ah Kle v. McLean, 2 Idaho 812; Newbould v. Stewart, 15 Mich. 155; Croft v. Miller, 26 Minn. 317; Dale v. Copple, 53 Mo. 321; Murphy v. King, 6 Mont. 30; Delaware L. & W. Ry. Co. v. Burkard, 109 N. Y. 648; Murray v. Scribner, 70 Wis. 228.

⁷Locke v. Hubbard, cases, 9; Freeman on Executions § 24.

⁸See post §§ 53, 60.

ceedings the record imports absolute verity, and cannot be contradicted.⁹ The evidence that a judgment was rendered, and what it was, does not reside in the memory of the judge, nor in the docket kept by him for his own convenience and not required by law to be kept, but in the record which the law requires the clerk to keep. Persons acting in reliance on the clerk's record will be protected, though the record be not according to the fact,⁴ as appears by the files in the case.²

§ 13. Yet it is believed that the judgment is the sentence of the law pronounced by the court. For when the clerk made an entry of final judgment without any judgment having been in fact pronounced by the court, and the court afterward proceeded to pronounce judgment, and have it recorded in utter disregard of the prior unauthorized entry, the court's judgment was affirmed on writ of error.⁴ In cases in which the absence of judicial action has appeared in a collateral proceeding the entry made by the clerk has been treated as an absolute nullity.² If no sentence was ever pronounced there is no judgment although the clerk has assumed to enter one. The judgment is the judicial act of the court; the record is the ministerial act of the clerk. Orders vacating and annulling such false entries after it was too late to have vacated a judgment have often been approved. Though the entry existed there never had been any judgment.² Even though a judgment had been pronounced, if the clerk has incorrectly recorded the sentence or any of the proceedings in the cause, the court will correct the error at any time. It is never too late to correct the

⁹Black on Judgments §§ 275, 276; Freeman on Judgments §§ 130, 134.

¹Black on Judgments § 169; McCormick v. Wheeler, 36 Ill. 114; American Ex. Bank v. Moxley, 50 Ill. App. 314.

²Ninde v. Clark, 62 Mich. 124, 4 Am. St. 823, 28 N. W. 765.

³Kayser v. Hall, 85 Ill. 511.

⁴Phelps v. Hawkins, 6 Mo. 197; Roderigas v. East River S. I., 76 N. Y. 316, 32 Am. Rep. 309.

⁵Lee v. Carrollton Sav. & L. Assn., 58 Md. 301; Barefield v. Bryan, 8 Ga. 463. See especially Butts v. Armor, 164 Pa. St. 73, 30 Atl. 357.

errors made by the clerk in making the record.⁶ The force of this statement is appreciated when we remember that, at the common law after the term at which judgment is pronounced, and under the statutes after the specified time, the court cannot modify the pronounced judgment and change the record so as to conform to the modification;⁷ and though the clerk has not yet made up the record, still the pronounced judgment cannot be later changed.⁸ When by reason of the death of the officer whose duty it was to record the judgment,⁹ or from some other cause,¹ the judgment has never been recorded, other courts have received the files in the case and the minutes made by the clerk or judge to prove the judgment, notwithstanding the general rule that judgments can be proven only by the record thereof.²

By the Court.

§ 14. We come now to consider the next phrase—*by the court*. Blackstone, adopting Coke's definition, says, "A court is a place where justice is judicially administered."³ "But this definition obviously lacks fullness; it is limited to the *place* of the court in its expression. In addition to the place,

⁶Ecker v. First Nat. Bank, 64 Md. 292; Chase v. Whitten, 62 Minn. 498, 65 N. W. 84; Cohn v. Scheuer, 115 Pa. St. 178, 8 Atl. 421; Williams v. Hayes, 68 Wis. 248, 32 N. W. 44; Dunham v. South Park, 87 Ill. 185; Freeman on Judgments § 73, and cases cited.

⁷Tidd Pr. 712, 942; 3 Blackstone's Com. 407; 15 Ency. Pl. and Pr. 202 et seq.; Freeman on Judgments §§ 69, 70; Black on Judgments § 154; Albers v. Whitney, 1 Story 310; Federal Cas. No. 137; Boland v. Benson, 54 Wis. 387; Whitwell v. Emory, 3 Mich. 84.

⁸Casement v. Ringgold, 28 Cal. 335. But see Edwards v. Evans, 61 Ill. 492. The time given within which to appeal is similarly reckoned from the "rendition of the judgment." "The record which was afterwards filed was not the judgment, but only a written memorial of the judgment which had been previously rendered." Bronson J. in Lee v. Tillotson, 4 Hill (N. Y.) 27; quoted in Gray v. Palmer, 28 Cal. 416.

⁹Davidson v. Slocomb, 35 Mass. (18 Pick.) 464; Story v. Kimball, 6 Vt. 541; Baldwin v. Prouty, 13 Johns. (N. Y.) 430; Wilkins v. Anderson, 11 Pa. St. 399.

¹Hickey v. Hinsdale, 8 Mich. 267; Dyson v. Wood, 3 Barn. & Cress. (10 E. C. L.) 449; Justice of Peace, 12 Ency. Pl. & Pr. 730.

²Cadwell v. Dullaghan, 74 Iowa 239; Taylor v. Runyon, 3 Iowa 474; Hinson v. Wall, 20 Ala. 298.

³3 Blackstone's Com. 23.

there must be the presence of the *officers* constituting the court, the judge or judges certainly, and probably the clerk authorized to record the action of the court; *time* must be regarded, too, for the officers of the court must be present at the time and place appointed by law in order to constitute a court. To give existence to a court, then, its officers and the time and place of holding it must be such as are prescribed by law.”⁴ From the foregoing we may sum up the essentials of a court as follows: 1, The business of the body must be the judicial administration of justice; 2, it must be a body created by law; 3, it is a court only when sitting at the place appointed by law, if any be appointed; 4, it is a court only when sitting at the time appointed by law, if any be appointed; 5, it can act only through its proper officers.

Upon the Matter Contained in the Record.

§ 15. Judgments are the sentence of the law pronounced by the court *upon the matter contained in the record*. The italicized phrases signify that in so far as the pronouncement is upon matters not contained in the record, that is, not before the court, it is no judgment; and in an action upon it the proper plea would be *nul tiel record*, that there is no such record. Moreover, no court is so constituted that every sort of controversy can be brought before it; and even as to matters that can be and are brought before it, the nature of the judgment which it can pronounce is limited by the law creating the court and declaring what sorts of judgments it shall have power to render. Therefore, to constitute a judgment: 1, the matter must be such as the court can pronounce upon; 2, must be in court to be pronounced upon; and, 3, the pronouncement must be such as the law creating the court enables it to make. Much

⁴Hobart v. Hobart, 45 Iowa 501.

The Clerk being Absent during a part of the trial was held, as it seems to me properly, not even to make the judgment voidable on error and exception, the judge having designated another to perform the duties of the clerk in his absence. Mealing v. Pace, 14 Ga. 627.

confusion has resulted from calling possession of these essentials jurisdiction of the subject-matter without indicating which of the three is referred to. Again, if the judgment is to bind anyone personally, which is what we mean when we say it is a judgment *in personam*, that person must be before the court. In order to have this, two things are essential: 1, the person must be such a one as can come or be brought before that court; and, 2, he must have been brought before it. Here, again, confusion has been introduced by speaking indiscriminately of possession of these essentials as jurisdiction of the parties.

Facts Essential to Jurisdiction of the Thing.

§ 16. In a double sense, the matter must be brought before the court. 1. The court must be asked to adjudicate concerning it, as a cause of action or defense. For example, the court could not decree a divorce between parties on a bill simply asking it to partition property held by them as tenants by entirety. This we may call presenting the matter in the pleadings. To give the court jurisdiction in this sense, the rule is this: "Can it be gathered from the allegations, either directly or inferentially, that the party was seeking the relief granted, or that he was entitled thereto? * * * It is not necessary that any material allegation should be sufficient in law, or that it should even tend to show facts that are sufficient."⁶ 2. But in many cases the matter must also be brought before the court in another sense. If the matter in controversy be a corporeal thing it can be bound by the judgment only by first being brought within the court's power. The parties being in court might be bound though the property was beyond the court's reach.⁶ And to put the property in the court's power it is not necessary that it shall have been actually seized by the court's officer. When the property is personalty it is enough to notify the party in possession to hold it subject to the court's order.

⁶Van Fleet on Collateral Attack § 61.

⁶Lindley v. O'Reilly, cases 65.

as is the common practice in all garnishment proceedings. Yet this may justly be said to make him an officer of the court. If the property be land it is enough that an entry be made by the proper officer in the public records specifying the attachment or claim as the statute requires. Even that is unnecessary in proceedings to foreclose a mortgage on land within the court's territory or to remove a cloud from the title. The non-resident claimants may be served by publication, or in such manner as the statute may direct; and no preliminary seizure is necessary to give the court jurisdiction of the thing.⁷ But unless the property be within the court's territory and be a part of the subject matter of the suit it will not be bound by the judgment.⁸

Judgments in Personam on Substituted Service.

§ 17. As to getting the persons into court, that may be done by their voluntary appearance or by use of the court's process. It has been thought in England that personal service out of the state, or notice within the state to some agent or member of the family, or seizure of property, or proclamation in the market square, were a sufficient compliance with "the law of the land" within the meaning of the *Magna Charta*;⁹ and at one time this idea prevailed to a considerable extent in this country.¹ But when the United States Constitution was so amended as to forbid depriving any person of life, liberty, or property without "due process of law," which is merely an adoption of the equivalent clause in the *Magna Charta*, the Supreme Court of the United States was made the final arbiter as to the meaning of the provision; and that court fully and finally exploded the whole doctrine in the now celebrated case of *Pennoyer v. Neff*.² Personal service within the jurisdic-

⁷Roller v. Holly, 176 U. S. 398.

⁸Pennoyer v. Neff, cases 48.

⁹Douglas v. Forrest, 4 Bing. (13 Eng. Com. Law) 693.

¹Skinner v. Moore, 2 Dev. & Bat. (N. Car.) 138, 30 Am. Dec. 155; PRICE v. HICKOK, 39 Vt. 292; Hurlbut v. Thomas, 55 Conn. 181, 10 Atl. 556.

²95 U. S. 714, cases 48.

tion is therefore indispensable to a valid judgment *in personam* in the United States now, in the absence of a voluntary appearance in person or by attorney and submitting to the jurisdiction of the court.

Necessity of Service to Validity of Judgments in Rem.

§ 18. There has often been a *failure to distinguish* in this respect between a proceeding *in personam* and a proceeding *in rem*. A proceeding *in rem* creates no personal obligation, and the prime essential is dominion over the *res*. No service is necessary in a proceeding *in rem*, and if any be required by statute it is merely matter of procedure.*

Effect of Denial of Right to Hearing in Either Case.

§ 19. A judgment was held void in the United States Supreme Court because the defendant therein was denied the right to a hearing *after* he had appeared, the court saying that a denial of *all right* to be heard is equal to turning him out of court. "It would be like saying to a party, Appear, and you shall be heard; and when he has appeared, saying, Your appearance shall not be recognized, and you shall not be heard."⁴

Effect of Acts of the Parties or of Other Courts.

§ 20. As a general rule, jurisdiction of the person once acquired cannot be taken away by any act of any party, stranger, or other court; but a removal of the cause or person to an appellate court, or from a state to a United States court, or by a change of venue, looks like an exception.⁵ And under this head may be mentioned the hopeless conflict in the decisions as to whether a judgment is voidable or absolutely void that

*See exhaustive review of decisions in Van Fleet on Collateral Attacks §§ 399-416.

⁴Windsor v. McVeigh, 93 U. S. 274, 278, cases 38, 42; Hovey v. Elliott, 167 U. S. 409.

⁵Black on Judgments § 243; Freeman on Judgments § 121.

is rendered after a plaintiff or defendant has died—been summoned to account in that court beyond the grave.⁶

Effect of Irregularities.

§ 21. I believe these are the only matters that should be held to be jurisdictional; but most courts until recently, perhaps I should say even to this day, hold judgments void though there was color of authority to act, whenever they resolve the doubt contrary to the conclusion reached by the court in which the offered proceedings occurred. Moreover, irregularities in matters of form and procedure have often been held to be jurisdictional defects. The Supreme Court of the United States, speaking through Justice Field, says, "A departure from the established modes of procedure will often render the judgment void; thus, the sentence of a person charged with a felony, upon conviction by the court, without the intervention of a jury, would be invalid for any purpose. The decree of a court of equity upon oral allegations, without written pleadings, would be an idle act, of no force beyond that of an advisory proceeding of the chancellor. And the reason is, that the courts are not authorized to exert their power in that way."⁷

How Jurisdictional Questions may be Raised.

§ 22. The question as to whether a court has this authority to act called jurisdiction (right to say), may be made and argued at three different stages of the case: 1. When the court proposes to or is asked to act, the court of its own motion or some of the parties may object that the court has no jurisdiction to act as proposed. In such cases the question which the court has to decide is not whether the action if taken would

⁶Black on Judgments § 200; Freeman on Judgments § 153. An exhaustive review of the decisions on this point will be found in a note to *Kager v. Vickery*, 49 L. R. A. 153; same case, 61 Kan. 342, 59 Pac. 628, 78 Am. St. 318.

⁷*Windsor v. McVeigh*, 93 U. S. 274, 283, cases 38.

be binding, but whether such action would be proper. 2. When the court has acted it may be asked to rescind such action; or a supervisory court may be asked to annul it on *certiorari*, error, appeal, or the like; on the ground that the court acted without jurisdiction. Here, as in the former case, the question to be decided is not whether such act by the court was binding, but whether it was proper; for it would be the duty of the court to annul such action upon finding it to be improper, even if it would be binding until annulled. 3. When a court has acted, and such action is set up in some collateral proceeding, objection may be then made to it as having no force or effect, and amounting to nothing for any purpose, because the court that took such action had no jurisdiction. It will be observed that in this last class of cases an entirely different question is before the court for decision. The question now presented is not whether the court should have done, but whether it could have done, the thing it assumed to do. The question is not whether the action was proper, but whether it was effectual, because the court had the power to do the thing it assumed to do. The decision in such cases should be controlled by considerations entirely different from those involved in the first two classes of cases. The objections made in cases of the first class are said to be made *in limine*; the objections in the second class of cases are *direct attacks*; the objections in cases of the third class are *collateral attacks*. The reports are full of discussions as to jurisdiction in cases of objection *in limine* or by direct attack. But as the validity of the action is not a question before the court for decision in such cases, that question cannot be decided in such cases, whatever the court may take occasion to say concerning it. Whatever the courts say of validity in such cases is mere *dictum*, and there is great danger that such remarks are not well considered.

The True Criterion of Validity on Collateral Attack.

§ 23. WHY COURTS ARE CREATED. The considerations that *should* influence courts in deciding whether judicial proceedings brought into question before them collaterally ought to be given effect or treated as mere nullities, are excellently stated by Judge Van Fleet in his treatise on Collateral Attack (from which, by his kindness, I am permitted to quote), as follows: "It is the duty of each person to yield to all others their rights according to the law of the land. But as differences will arise in regard to the facts in particular cases, and also in regard to the law, judicial tribunals are organized to settle those differences. It is the *sworn duty* of such tribunals to determine and fix the rights of the parties in each particular case brought before them, *if they have power to do so*."

§ 24. PRELIMINARY MATTERS NECESSARILY DECIDED IN EVERY CASE. "To do this, they must determine what the facts are and the law applicable thereto. This duty rests with equal weight upon the humblest magistrate and the highest court; and the duty being the same the power must be the same. The facts must be determined either from the evidence or from the want of evidence. On that the tribunal may err. The law must be determined from the books. On that the tribunal may err. By assuming to act at all, or to investigate any case, the tribunal determines that a valid, constitutional law authorizes its own organization, and that it has been duly organized; that the judge or judges presiding, and the other officers present, are the proper ones, and duly qualified to act, and that by and through them the corporate tribunal may lawfully act; and that the time and place of sitting are authorized by law. By assuming to order process for the defendant, or to pass upon or ratify process already issued, the tribunal determines that a valid constitutional law gives it jurisdiction over the subject-matter of the particular case presented, and by assuming to call or default the defendant, it determines that process, lawful in form, has been lawfully served upon him by the proper officer

or person at the proper time and place. By allowing an appearance it determines that the person so appearing has the lawful right to do so.

§ 25. DISTINCTIONS AS TO THE SOURCE OF THE LAW AND THE DIGNITY OF THE COURT. "All questions concerning the organization of the tribunal, the time and place of its sitting, its jurisdiction over the subject-matter, its right to issue process for the defendant, the validity of the process issued and service made, are questions of law that must be decided in each case. They may be constitutional, statutory or common law, and a critical examination and comparison of all three may be necessary in order to determine some small right before a magistrate, commissioner, or board exercising judicial powers; and as the command of the law that justice shall be done in each case is as imperative to the lowest judicial tribunal as to the highest, and as it requires the same oath from the magistrate and the judge of the court of last resort, it necessarily follows that in determining the validity of their proceedings collaterally, the same rule must be applied to all. And as no one would think of holding a judgment of the court of last resort void if its jurisdiction were *debatable* or even *colorable*, the same rule must be applied to the judgments of all judicial tribunals.

§ 26. SUMMARY. "This is the true theory of judicial action when viewed collaterally. If any jurisdictional question is *debatable* or *colorable*, the tribunal must decide it; and an erroneous conclusion can only be corrected by some proceeding provided by law for so doing, commonly called a direct attack. It is only where it can be shown, lawfully, that some matter or thing essential to jurisdiction is *wanting*, that the proceeding is void, collaterally."⁸

§ 27. DISTINCTION AS TO THE DEGREES OF DOUBT. "When a claim is presented to a judicial tribunal and relief

⁸Van Fleet on Collateral Attack, pp. 1-2.

demand, it is in duty bound¹ to hear the plaintiff, at least, and determine whether or not the law authorizes it to grant the relief sought. This is purely a question of law. It may be very simple or very complicated. It may be easily and certainly determined by reference to a familiar section of the statute or principle of the common law, or it may remain in much doubt after the most laborious comparison of the common law, statutes and constitutions, both state and federal. But as long as there is anything to compare the comparison must be made; as long as there is a debatable question, it must be considered; and from such comparison and consideration, an erroneous conclusion may be reached; and as the tribunal is compelled by law thus to investigate, compare, and consider, and to draw a conclusion of law therefrom, it necessarily follows that such conclusion, however erroneous, is not a nullity and void collaterally. So to hold, would be to punish the judges for their want of brain and discrimination. [Is it not rather punishing the public for the mistakes of the judges?] It must also be remembered that the officer presiding over the tribunal may be quite ignorant of law, and not fully able to understand the fine distinctions made, yet the command of the law, that justice shall be done to the parties in that particular case, rests as heavily on *his* conscience as on the conscience of the most eminent judge. Hence, although the error in assuming or declining jurisdiction may be too plain for debate *before judges skilled* in the law, that does not necessarily make *his* decision void. The true rule seems to be that if the question is *colorable*—such as a person unskilled in the law might mistake—it will shield the decision from collateral assault.”⁹

§ 28. WHY PUBLIC POLICY DEMANDS THAT THIS TEST BE APPLIED. Having thus shown this to be the only test of validity consistent with the nature and theory of judicial proceedings, the same learned writer proceeds to show as it seems

⁹Van Fleet on Collateral Attack § 66.

to me conclusively—not only that this is the only test of validity consistent with the attainment of justice, peace, and security to the public, the only purposes for which courts were created—but that it is indispensable to the maintenance of respect for the courts by the public.

§ 29. SAME. He says, “It is the duty of the courts to set their faces against all collateral assaults on judicial proceedings for two reasons, namely: *First*. Not one case in a hundred has any merits in it. The reader of this work will see that innocent purchasers, by means of collateral assaults on their titles derived through judicial proceedings, have been compelled to yield millions to dishonest debtors on account of bald technicalities that caused no actual harm whatever, and that, by the same means, criminals who have been fairly tried and justly convicted and sentenced, have caused untold vexation and expense to innocent prosecutors and officers. An old case said, ‘Judges will invent reasons and means to make acts according to the just intent of the parties, and to avoid wrong and injury which by rigid rules might be wrought out of the act.’ When the court can plainly see that a dishonest debtor or criminal is attempting to use it to wrest property from innocent purchasers, or to punish honest people, the judge ought to be as astute in inventing reasons to thwart him. *Second*. The second reason why courts should reduce the chances for a successful collateral attack to the lowest minimum is, that they bring the courts themselves into disrepute. Many people look upon the courts as places where jugglery and smartness are substituted for justice, and nothing tends more to increase their numbers than to see their property and rights, held under the solemn adjudications of the courts snatched away on account of some defect or omission in a summons, or return of service, or petition, which caused no actual harm to any one. Such things tend to weaken law and order and to cause men to settle their rights by violence. For these reasons, when the judgment rendered did not exceed the possible power of the

court, and the notice was sufficient to put the defendant upon inquiry, a court should hesitate long before holding the proceedings void collaterally.”¹

§ 30. CONCLUSION AND PROSPECT. Thus much as to the true criterion of validity in cases of collateral attack on judicial proceedings in which the court had erred in its conclusion on some matter of law (common, statutory, or constitutional) or upon the facts, touching the court’s authority or the merits of the case, whereby a judgment had been rendered that should not have been rendered.

Whether Irregularities Should be Held to Make the Judgment Void.

§ 31. THE ARGUMENT ABOVE GIVEN APPLIES WITH GREATER FORCE to cases in which the error as to the matter of law related, not to the merits of the case, but to the method of proceeding. A disobedience of the law in this respect, either from error or oversight, is called an irregularity. In this case as in the other it may be a rule of law common, statutory, or constitutional.

§ 32. GREAT AND SMALL IRREGULARITIES DISTINGUISHED. An attempt has been made to distinguish between minor irregularities and greater ones; but clearly this is a difference in degree, not in kind. If it be admitted that there are any irregularities that will expose the judgment to collateral attack, there is no place to draw the line of distinction between those which avoid and those which do not. The forms of action, the steps in the progress of each, and the character of the deviations are so numerous and varied that if one man were to decide all the cases he could not be consistent with himself in holding some irregularities jurisdictional and others not unless he could “sever and divide between the northwest and the northwest side.”

¹Van Fleet on Collateral Attack, p. 3; to the same effect, Woerner on Administration § 145.

§ 33. NATURE OF THE LAW DISOBEYED. An attempt has also been made to distinguish between violations of common law rules, violations of statutory requirements, and violations of constitutional requirements. It has been said that some statutory provisions are mandatory and that others are merely directory; but that cannot be, for the very essence of the law is its imperative character, "commanding what is right and prohibiting what is wrong;" otherwise it is not law at all, but mere advice.² The statute controls the common law, the new statute controls the old, and the constitution is paramount to both; but each is as imperative as any other when they do not conflict. What is really meant by such statements is this: If the statute commands something to be done in a particular way *without providing what shall be the effect of disobedience*; and the act done in some other way comes up collaterally, the court must say whether the deviation was fatal or only ground for objection in the very proceeding in which the error occurred. That is to say, the court promulgates a rule of the common law not found in the statute at all, and declares the provision mandatory and the deviation fatal in one case, and merely directory, and the departure an irregularity in another. If the statute provides explicitly what shall be the effect of deviation, its provision must control, whatever it may be; but if it does not provide for that contingency, the court has no recourse but to apply a rule of its own.

§ 34. NATURE OF THE CONFLICT IN THE DECISIONS. I do not believe the decisions of any state on this subject can be reconciled with themselves, much less with the decisions of any other state; and therefore, I shall pass over this vexed question by simply giving extracts from two cases cogently stating why irregular judicial proceedings should be given effect when attacked collaterally.

²Introduction to Blackstone's Com. p. 44.

§ 35. WHY NO STATUTORY REQUIREMENTS AS TO PROCEDURE SHOULD BE HELD TO BE JURISDICTIONAL UNLESS EXPRESSLY MADE SO.—AN ILLUSTRATIVE CASE. An early Alabama decision upheld the title of a purchaser at an administrator's sale made without obeying several provisions of a statute providing that "any order of sale, and sale, made without a compliance with the requisitions of this act, shall be wholly void."

§ 36. SAME. The court held that "*this act*" meant *this section*; but the reasons given for so holding would equally sustain the contention that the statute applied only to direct attacks. The following is from the opinion of the court in this case: "It is argued for the appellants, that under the last clause of the fifth section of this statute [above quoted], every order of sale, and sale, made without a compliance with each of the several requisitions of the five sections above noticed, is wholly void. We cannot assent to such a proposition. The maintenance of it would lead to consequences alike absurd and injurious. It would make a strict compliance with a large number of statutory requisitions the unyielding standard of the validity of all orders of sale. Some of those requisitions pertain to matters not evidenced by the record. For example, a decree of sale would be void, if the guardian *ad litem* were of kin to the administrator, or if there was an inaccuracy in the list or description of the heirs, or their residences, or if the directions as to the mode and time of giving notices were not strictly observed. One desiring to purchase at the sale would be unable to ascertain, by an examination of the record and papers, whether the title would be valid. After making the most careful inquiry, and finding no defect in the proceedings, and therefore venturing on a purchase, his title might be defeated by evidence that there was some heir whose name was overlooked or forgotten by the administrator, or not known by him, and, therefore, not inserted in his petition. In like manner, his

title might be defeated by a mistake as to the residence of any one or more of the heirs. Many other equally forcible illustrations of the unavoidable and irremediable uncertainty of such sales might be given."

§ 37. SAME. "When it is considered that the probate judges do not usually belong to the profession of the law, and are not chosen generally for their legal attainments, it is not difficult to perceive that, if the proposition asserted by the counsel should be maintained, a valid sale of land under the order of the probate court, since the date of the act of 1854, would be an exception to a general rule. Not merely the tendency, but the inevitable effect of such a decision, would be to destroy confidence in such sales, and cause great injury to heirs by sales at greatly depreciated prices, when an exceptional case of a compliance with the numerous requisitions of the statute occurs. The legislature will be held to have absurdly subverted its own purpose of benefitting estates, by affording a safe, cheap, and expeditious mode of accomplishing the sales required by the process of administration, with the strictest care for the interest of the persons interested; and to have adopted a plan which would lead to the sacrifice of estates."

§ 38. SAME. "The courts of the country would be filled with suits, in which the validity of sales will be contested upon the question of a compliance with all the minute details of the machinery by which the sale was reached. The absurd and ruinous consequences of a statute which is plain, afford no justification for setting it aside by the courts; * * * but if there is uncertainty and obscurity in the law, such consideration may be taken into view, as a help to the ascertainment of the legislative intention."³

§ 39. ANOTHER ILLUSTRATIVE CASE. In a case presented to the Supreme Court of Ohio, an action under the code

³Satcher v. Satcher's Admr., 41 Ala. 26, 91 Am. Dec. 498; to the same effect, Woerner on Administration § 145.

to recover real property had been brought, by one who had purchased it on mortgage foreclosure, against one who had purchased the premises at the sale made by the sheriff in foreclosure of a prior mortgage in the common pleas. The sheriff's sale had been confirmed without objection by anyone, and the plaintiff was party to the proceedings. In the appraisal of the property preliminary to the sheriff's sale the purchaser, defendant herein, had acted as one of the appraisers. For this reason, the plaintiff claimed that the sale was made void by the statute which provided, that "no sheriff or other officer making the sale of property, either personal or real, nor any appraiser of such property, shall, either directly or indirectly, purchase the same; *and every purchase so made shall be considered fraudulent and void.*" The court held that the statute applied only to direct attacks, and that the sale was not void collaterally.

§ 40. SAME. The following is from the opinion of the court: "If a sale to an appraiser be absolutely void, so that it may be impeached in a collateral proceeding, it follows that the defendant has no legal title to the premises in controversy; but if the sale be voidable only, and good until avoided by a direct interposition or proceeding for that purpose, then he has a legal title to the premises, and the judgment of the court below was right."

§ 41. SAME. "The language of the statute is, 'every purchase so made shall be considered fraudulent and void.' What is the precise idea which the legislature intended to express in the use of this language? Was it intended that such sales, and all conveyances made in pursuance of them, should be, as to all the world, and under all circumstances, as if they had never been made—however advantageous the sale may have been to all parties interested, and however desirous such parties might be to maintain and enforce it? Or was it intended only, that whenever a party interested in the sale should directly interpose, or institute a proceeding to avoid the sale,

it should 'be considered,' that is to say *adjudged* by the court, that the fact of the purchaser having been an appraiser was conclusive evidence of fraud, and that the sale should there-upon 'be considered' or adjudged void? This is the question."

§ 42. SAME. "If the language of the statute were entirely unequivocal, we should be bound to follow it, to whatever consequences it might lead, short of a manifest absurdity. But this can hardly be said of the language of this clause of the statute. * * * In the construction of statutes we may look to the mischiefs, if any, which the statute was designed to remedy, and also to the consequences which would flow from any particular construction; and if the statute be fairly susceptible of two different constructions, we are at liberty to choose that one which, while it remedies the mischief aimed at, avoids the absurd or unjust consequences which would flow from the other. Now, the mischief which this statute aims to prevent is obviously that which arises from fraudulent appraisements, made with a view to the individual advantage of the appraiser when he becomes a bidder at the sale. This mischief is as effectually prevented by holding the sale to be voidable, at the option of the parties interested, on a proceeding for that purpose, as it would be by holding it to be an absolute nullity; while the injurious consequences,—which would often follow if the sale be held to be strictly void,—of depriving the parties interested of the benefit of a highly advantageous sale, and a purchaser who, though held fraudulent by the policy of the statute, may be wholly innocent in fact, of the purchase money he had paid,—would be avoided. For it may well be, that an appraiser may be willing to bid more for a parcel of real estate than any one else; he may have bought at the request of all the parties interested; and yet if his purchase be strictly void, it can not stand, although all parties may be anxious to sanction and confirm it."

§ 43. SAME. "It may be here said, however, that the plaintiff, Terrill, was a party interested in the sale; and that

he does wish to avoid it by means of this suit. But not so. This is a suit for the recovery of land; and is not a suit to avoid the sale, in the sense of causing it to be set aside and a new sale made, so that justice may be done to all parties; but the circumstances would indicate rather that he is wishing to affirm the sale so far as to have a lien preferable to his own, satisfied by the proceeds of the sale, and to disaffirm it so far as necessary to enable him wrongfully to dispossess the purchaser, and to appropriate the land under his own junior lien. With such a disaffirmance we can have no special sympathy.”⁴

§ 44. EFFECT OF HOLDING IRREGULARITIES NOT JURISDICTIONAL. If the statute had been given the force of a rule of the common law in every case, and the statutory proceeding treated with the same consideration as a common law proceeding, justice would generally have been attained. If experience proved any provision of the law to work hardship, the legislature could easily amend the law in that particular so as to avoid the difficulty. For example, if attachment without other notice than publication were found to work hardship, personal notice out of the state might be required as to defendants having a known residence, or the attachment debtor might be given a right of action against the attaching creditor and on the bond for the difference between the actual value of the property taken and the amount of his actual indebtedness and costs. But when the courts give relief by declaring the proceedings void for technical defects, Pandora’s box is opened and a long train of evils is entailed. The same is true of the other forms of procedure.

§ 45. WHY STATUTORY REQUIREMENTS ARE HELD TO BE JURISDICTIONAL. I have never known any reasons to be given for these decisions, except that the statute was the only authority for the proceeding. But the conservatism and aversion to innovations induced by our system of jurisprudence, the following of precedents; the desire to relieve from a hard

⁴Terrill v. Auchauer, 14 Ohio St. 80.

case, property worth thousands of dollars seized and sold for a mere pittance on a doubtful claim in proceedings of which the owner had no actual notice; and the failure of the courts to foresee the effects of their decisions,—these seem to me sufficient reasons to account for the fact that such decisions have been made. The courts have not reasoned the matter out on general principles, in broad terms; counsel are equally in the dark; and the press of business will not permit either to go to the bottom of the matter. “The trouble with them is a want of generalization. The great point in any science is to generalize. The vast, almost infinite, superiority of algebra over arithmetic lies in its generalization. The tribunal always deals with a particular case.”⁶

Summary of the Essentials of Judgments.

§ 46. It has seemed necessary to give thus much attention to the vexatious subject of jurisdiction, in order to get a clear and complete conception of what a judgment is; and this brings us to the end of our first topic, the definition of a judgment; and we may now state our conclusion that a judgment is the sentence of the law pronounced by the court upon the matter contained in the record. From the foregoing review of our definition, we may discern the following essentials of a judgment: 1. If nothing be done, if there be no pronouncement, clearly there is no judgment. 2. If the pronouncement be not in the nature of a sentence, it is no judgment. 3. If pronounced by any body other than the court, it is no judgment. 4. If upon matter that court is given no authority by law to hear and determine, it is no judgment. 5. If that court is not given authority by law to pronounce such a judgment in any case, it is no judgment. 6. If the matter pronounced upon be not before the court, it is no judgment. 7. It is not a judgment *in personam* unless the person pronounced against was before the court.

⁶Van Fleet on Collateral Attack § 66.

2. KINDS OF JUDGMENTS.

§ 47. Judgments may be classified from various points of view, according to the purpose intended to be served by the classification. The following classifications are some of the most important: 1. As to their effect in disposing of the action, judgments are either interlocutory or final. As we have seen, only the final are really judgments. Final judgments are those which completely dispose of the particular action, though not necessarily of the controversy involved in it. 2. Judgments are either absolute or nisi, according as they are to have effect at all events or only upon the happening or not happening of some specified event. 3. As to the place where rendered, judgments are either domestic or foreign. A domestic judgment is one rendered by a court of the same sovereignty. A foreign judgment is one rendered by any other court. 4. As to the state of the pleadings at the time the judgment was rendered, it is: (a) on an issue of law, (b) on an issue of fact, (c) when the pleadings raise no issue, or (d) on abandonment of the suit by the plaintiff. 5. As to the binding effect, the judgment is either valid or void, and if valid is either *in personam* or *in rem*, and if *in rem*, is either *in rem* generally or as to particular persons or purposes. The difference in the binding effect of judgments *in personam*, and judgments *in rem*, either generally or specially, will be explained more fully when we come to consider the effect of judgments.

3. THE RECORD OF THE JUDGMENT.

Nature and Form, §§ 48-52.

Definition, § 48.

English Practice, § 49.

American Practice, §§ 50-52.

Entering and Amending, § 53.

Essentials of the Record, §§ 54-56.

How the Question Arises—Cured in Same Court, § 54.

How far Presumptions Aid the Record, § 55.

What must Always Appear, § 56.

Conclusiveness of the Record, §§ 57-60.

The Original Doctrine, § 57.

Modern Limitations of the Doctrine, § 58.

Does not Apply to Inferior Courts, § 59.

Records of Domestic Courts Conclusive on Collateral Attack, § 60.

NATURE AND FORM.

Definition.

§ 48. "The record in judicial proceedings is the written history of the proceedings and transactions of the court, kept as a perpetual memorial thereof."¹

English Practice.

§ 49. In primitive times all the proceedings were oral in open court, the declaration, pleadings, judgment, everything; and the judge or his clerk took rough notes of the proceedings as they progressed. These were finally amplified on parchment, and filed as a perpetual memorial. When the pleadings came to be made in writing on paper, this custom of copying them on parchment was continued. As soon as the verdict had been found and reported, the signature of the proper officer

¹Record. 20 Am. & Eng. Ency. (1st ed.) 475.

was obtained on a sheet of paper called a final judgment paper. This was called signing judgment. As soon as this was done, the successful party might make the record on parchment. This was called entering the judgment of record; and when this parchment copy had been filed it was called the judgment roll. Leaving the roll in the treasury of the court was called filing the record. The clerk kept a book in which all these records were indexed. Making the entry in the index was called docketing the judgment.² The following, copied from Wentworth's Pleading,³ will give some idea of the nature of these records:

ENGLISH JUDGMENT ROLL.

PLEAS before our lord the king at Westminster of the Term of St. Michael, the twenty-sixth year of the reign of our sovereign lord George the Third, by the grace of God of Great Britain, France, and Ireland, king, defender of the faith, and so forth, in the year of Our Lord 1785.—Roll, Stormont and Way.

London, Be it remembered, that in the Term of the Holy Trinity last past, before our lord the king at Westminster, came Robert Hunter, by Giles Blake his attorney, and brought into the court of our said lord the king then there his certain bill against John Bermingham, being in the custody of the marshalsea of our said Lord the King, before the king himself, of a plea of trespass on the case, and there are certain pledges for the prosecution, to wit, John Doe and Richard Roe; which bill follows in these words, to wit; London, to wit. Robert Hunter complains of John Bermingham—[here follows the bill in full except the signature, then the imparlance, plea, and continuance].

Afterwards, that is to say, on the day and at the place within mentioned, before the Honorable Francis Buller esquire, the justice within mentioned, John Way gentleman being associated with him, according to the form of the statute in such case made and provided, came as well the within named Robert Hunter, as the within named John Bermingham, by their respective attorneys within mentioned, and the jurors of the jury within mentioned being called likewise came; who, being tried and sworn to speak the truth concerning the matters within contained, and after evidence being given to them of and upon the within contents, went from the bar of the court to discuss their verdict of and upon the premises, and after the said jury has discoursed and agreed among themselves they come back to the bar and say that the said John Bermingham did undertake and promise in manner and form as in the said declaration is complained against

²Tidd Practice, 930-939; Stephen Pleading, III.

³Vol. I, pp. 327, et seq.

him; and they assess the damages of the said Robert Hunter on occasion of the premises mentioned in the sum of fifty-eight pounds three shillings and sixpence, over and above his costs and charges by him laid out in his suit in this behalf and for those costs and charges to forty shillings; Therefore it is considered that the said Robert Hunter recover against the said John Bermingham his damages aforesaid, by the jury aforesaid in manner and form assessed, and also four pounds and thirteen shillings for his costs and charges aforesaid to the said Robert by the court of our lord the king now here adjudged of increase, with his assent; which said damages in whole amount to sixty-four pounds sixteen shillings and sixpence, and the said John Bermingham is in mercy.

American Practice.

§ 50. WHERE JUDGMENT IS FORMALLY RECORDED. The English practice is followed to a great extent in some states;⁴ but the entries are usually required to be made by the clerk of the court instead of by the attorney, in books instead of on loose sheets, and on paper instead of parchment. Probably no court in this country has its records kept in parchment. The student must examine the statutes, court rules, and decisions of his own state in order to learn the proper practice there; but it may be worth while to make a few suggestions as to the practice generally. In New York the successful party must make a judgment roll for the clerk, by preparing exact copies of all the papers on file in the case and attaching them together, or by attaching the original papers together, and in either event adding a copy of the judgment as entered in the judgment book, and filing the whole with the clerk; or the clerk may at his option make up the record himself.⁵ So, in Minnesota and the Dakotas, except that it is the duty of the clerk to make up the roll.⁶ So, in Wisconsin, unless the party shall furnish the roll to the clerk.⁷ In California the rule is the same, except that the clerk makes up the roll by attaching

⁴Records, 20 Am. & Eng. Ency. of Law (1st ed.) p. 475.

⁵New York Civil Code (1899) §§ 1237, 1238; Knapp v. Roche, 82 N. Y. 366.

⁶Minn. Stat. (1894) § 5423; S. Dak. Comp. Laws § 5103; Locke v. Hubbard, 9 S. Dak. 364, 69 N. W. 588.

⁷Wis. S. & B. Stat. (1898) § 2898.

together the original summons, proof of service, pleadings, a copy of the verdict, the bill of exceptions if any has been filed, and a copy of the judgment as entered in the judgment book.⁸ In each of these states the statutes also require the clerk to enter the judgment at large in a book called the judgment book, and it is a copy of this entry that completes the judgment roll. In each of these states, also, the clerk is required to keep an index of judgments, usually called the judgment docket, or the judgment and execution docket, in which he enters the names of the parties to the judgment, its date and amount, and whatever is done toward executing or satisfying it.

§ 51. WHERE JOURNAL ENTRIES AND FILES ARE THE RECORD. In Illinois, Indiana, Iowa, and Ohio,⁹ the practice is more like the practice in Michigan, which more nearly resembles the primitive than the modern English practice. No formal record is made up at all, but the files in the case and the entries made by the clerk, in the journal of the proceedings of the court while in session, stand in the place of the formal record.¹ According to this practice, the files in the case are treated as a part of the record; and such action taken by the court in the case as does not appear from an inspection of the files, is shown by the journal. But in these states the clerk is required to keep an index or indexes, as in the other states, called a docket, and showing the names of the parties to each judgment, its amount, its date, and what has been done in the way of enforcing it or satisfying it. A fair idea of the character of the journal entries will be obtained by examining the following:

⁸Cal. Code Civ. Proc. (1895), § 670, as cited in *Estee's Pleadings* (1898) § 4760.

⁹Hurd's Stat. Ill. (1899), Ch. 25, §§ 13-16; *Jasper v. Schlessinger* (per Moran, J.), 22 Ill. App. 637, cases 3; Ind. Stat., Rev. 1894, § 588 et seq.; *Galbraith v. Sidner*, 28 Ind. 142; Iowa Code (1897) §§ 288, 3784; *Campbell v. Ayres*, 6 Iowa 339; *Brown v. Barngrover*, 82 Iowa 204; Ohio Civil Code (Whittaker, 1896) § 5331 et seq.

¹Mich. Comp. Laws (1897), § 314; *Emery v. Whitwell*, 6 Mich. 474, 486.

JOURNAL ENTRIES IN MICHIGAN CIRCUIT COURT.

Monday, May 7th, A. D. 1900.

At a regular session of the Circuit Court for the county of Washtenaw, commenced and held at the court house in the city of Ann Arbor, on the seventh day of May in the year of our Lord one thousand nine hundred, 1900.

Present, the Hon. E. D. Kinne,
Circuit Judge.

The court opened for business in due form at ten a. m.

[Here follow several entries concerning criminal cases, then the following.]

Ella Glazier

v.

The City of Ypsilanti.

In this cause, the parties being in court by their respective attorneys ready for trial, thereupon came a jury of twelve good and lawful men, to wit, Michael P. Alber, John Volz, Theodore Mohrbox, George Chapman, George Greske, Robert Campbell, Burt Martin, Ray Buckalew, Frank Gilpen, William Dolan, Gottlob Hutzal, and August Otto, who, being duly impaneled and sworn well and truly to try the issue between the parties, sat together and heard the allegations and proofs of the parties until the hour of adjournment,

Whereupon the Court adjourned till tomorrow at nine a. m.

[Signed] E. D. Kinne, Circuit Judge.

Tuesday, May 8th, A. D. 1900.

Court met pursuant to adjournment and opened for business in due form at nine a. m.

Ella Glazier

v.

The City of Ypsilanti.

The jury heretofore impaneled and sworn in this cause sat together and heard further proofs, the arguments of the attorneys for the respective parties and the charge of the court, and retired from the bar under the charge of Charles Dwyer, an officer of the court duly sworn for that purpose, to consider their verdict; and, after being absent for a time, returned into court, and say upon their oaths that the city of Ypsilanti is guilty in manner and form as the plaintiff has in her declaration in this cause complained against it; and they assess the damages of the said Ella Glazier on occasion of the premises, over and above her costs and charges by her about her suit in this behalf expended, at the sum of six hundred dollars; therefore, on motion of A. J. Sawyer & Son, attorneys for said plaintiff, it is considered and adjudged by the court now here that Ella Glazier do recover against the said city of Ypsilanti the said sum of six hundred dollars, together with her costs and charges to be taxed, and that execution do issue therefor.

[Here follow the entry in the next case and the other proceedings for the day, signed at the end by the judge as on the previous day.]

§ 52. JUSTICE COURT RECORDS. What is above stated has reference only to records in the superior courts. Justices of the peace usually have what is called a docket in which they enter, under the caption of each case, in ledger form rather than in the form of a journal, a minute of whatever is done in the case from the issuing of the original process to the return of satisfaction on the execution.

ENTERING AND AMENDING THE RECORD.

§ 53. The record should be an accurate contemporaneous history of the proceedings, showing all the essential facts. But failure of the clerk to make up the record during the term does not deprive him of power nor relieve him from the duty to make it up later. The court may, of its own motion, order the record made, even after years of neglect. When the entries have been made the clerk's powers cease. No man would be safe if the clerk could change the records to suit his convenience. If he learns that his version of the proceedings does not accord with the facts he cannot rectify his error; but the court may at any time order any part of the entries to be so changed as to accord with what was done. For this purpose, notice to the parties is not jurisdictional; though it ought always to be given, to enable them to show any reason why the change should not be made; and a party prejudiced by the omission may have the amending order vacated for that reason. The court should not rashly conclude that the entry is inaccurate; and many courts hold that no change can be made on the unsupported recollection of the judge and spectators, but only when the fact appears on the face of some of the papers in the case. This makes the clerk more powerful than the court. On the other hand, it is said that the trial court is the only judge of the competency and sufficiency of the evidence to prove the fact. Yet, should not a court of review compel

the correction of an indisputably erroneous statement in the record? The right to a day in court is nothing without the right to have the proceeding correctly recorded.²

ESSENTIALS OF THE RECORD.

How the Question Arises—Cured in Same Court.

§ 54. What is a sufficient record is a question that may arise: 1, in the same proceeding; or, 2, in another proceeding, (a) in the same court, or (b) in some other court. If in the same court, though in another proceeding, want of record evidence of any essential facts can usually cause little trouble, provided you can convince the judge that these facts existed; for he may then order the objection removed on the spot, by amending the record so as to supply the defect.³

How Far Presumptions Aid the Record.

§ 55. But if the question arises in another court, the result is likely to be more serious. In such cases it is material to inquire whether the court in which the judgment was rendered was one of special and limited jurisdiction or one of general jurisdiction; and, if the latter, whether the particular proceeding came within its general powers, or was some extraordinary statutory proceeding, of which it had jurisdiction by virtue of the statute. If the court was a superior court of general jurisdiction, and the proceeding in question was within the scope of its general powers, there is a presumption that all

²For authorities on the matters in this section see: *Balch v. Shaw*, cases 81; *Hughes v. Streeter*, cases 506; *Commonwealth v. Magee*, cases 307; *Freeman on Judgments*, §§ 69-74; *Black on Judgments*, § 153-169.

JUSTICES OF THE PEACE have been held not to possess the power to change their records or add to them when once entered. *King v. Bates*, 80 Mich. 367, and cases cited. *Contra*: *Gates v. Bennett*, 33 Ark. 475.

³*Dewey v. Peeler*, 161 Mass. 135, 42 Am. St. Rep. 399; *Hoggatt v. Montgomery*, 7 Miss. (6 How.) 93.

the facts existed to give it jurisdiction of the matter and of the parties, and such facts need not be shown by the record. But if what was done to obtain jurisdiction is stated in the record, there is no presumption that anything else was done, though essential to obtain jurisdiction.⁴ The rule is different with respect to courts of special and limited jurisdiction, and with courts of general jurisdiction acting under an extraordinary statutory authority. In such cases, according to most courts, there is no presumption of law in favor of their jurisdiction. The jurisdictional facts must then affirmatively appear from sufficient evidence or proper averments in the record, or the judgment will be deemed void.⁵

What Must Always Appear.

§ 56. But besides the above, all of the following must always appear: 1. That what is offered was really intended as a record by the court whose judgment it records. 2. Who were the parties in whose favor and the parties against whom the judgment was rendered. 3. That judgment was rendered, and what that judgment was; if for damages, how much; if for property, what property. No particular form of words is ever necessary. It is well enough if the substance can be gathered from the record as a whole. It need not show the names of the jury, the form of the action, or the evidence on which the judgment was based; and need not be signed by the judge unless the statute requires it.⁶

⁴Hahn v. Kelly, 34 Cal. 391, 405, 94 Am. Dec. 742; Black on Judgments § 277; Freeman on Judgments § 125.

⁵Galpin v. Page, 18 Wall. 350, 366; Wells v. American Ex. Co., cases 31; Greenvault v. Farmers' & M. Bank, cases 24; Jurisdiction, 17 Am. & Eng. Ency. Law (2d ed.), 1073-1085.

⁶Judgments, 11 Ency. Pl. & Pr. 925 et seq.; Black on Judgments §§ 114-123; Freeman on Judgments §§ 50-55.

CONCLUSIVENESS OF THE RECORD:

The Original Doctrine.

§ 57. "The rolls," said Lord Coke, "being the records or memorials of the judges of the courts of record, import in them such uncontrollable credit and verity, as they admit no averment, plea, or proof to the contrary. * * * And the reason thereof is apparent; for otherwise there should never be any end of controversies, which should be inconvenient. * * * During the term wherein any judicial act is done, the record remaineth in the breast of the judges of the court, and in their remembrance, and therefore the roll is alterable during that term, as the judges shall direct. But when the term is passed, then the record is in the roll, and admitteth no alteration, averment, or proof to the contrary."⁷

Modern Limitations of the Doctrine.

§ 58. This doctrine is necessary that there may be an end of disputes. But when applied in its pristine rigor, to all cases and under all conditions, it was too harsh and unreasonable to stand. It would be hard to say exactly how much of it remains. The modern decisions upon it are very numerous, and far from uniform; yet the following propositions may be stated as settled beyond dispute:

1. Statements in the record may always be disputed in all proceedings instituted for the purpose of proving the falsity of the record, to the end that it may be so amended as truly to state the facts, or that the proceeding may be declared void or limited in its effect, because some essential facts alleged did not exist.⁸

2. Statements in the record may be disputed, and always might be, in actions by the party injured against the officer

⁷Coke Lit., p. 260. See also, 3 Bl. Com. 407.

⁸Black on Judgments § 288.

making the false entry to recover the damages resulting from his wrongful act.⁹

3. Strangers to the proceeding are not concluded by statements of fact made in the record so far as their interests are affected.¹

4. In actions on foreign judgments the defendant may show that the judgment is void because some jurisdictional fact alleged in the record did not exist.²

Does Not Apply to Inferior Courts.

§ 59. Perhaps all has been said that can be stated with assurance. There is a fundamental distinction made in this connection between superior courts and inferior courts. We have seen that there is a presumption in favor of the jurisdiction of superior courts, though the facts are not stated, and that there is no such presumption with regard to the jurisdiction of inferior courts. As to the latter, most courts hold that extrinsic evidence cannot be admitted to prove that to have been done as to which the record is silent;³ but there are decisions the other way.⁴ Yet, if all jurisdictional facts are alleged, and it appears from the record that those facts were tried and judicially found, that finding cannot be collaterally contradicted.⁵

Records of Superior Domestic Courts Conclusive on Collateral Attack.

§ 60. When the records of the judgments of superior courts do not state the existence of jurisdictional facts, nor state what was done to obtain jurisdiction, some courts hold that

⁹Michaels v. Stork, cases 83.

¹Freeman on Judgments §§ 335, 416-419. The record is conclusive evidence to prove its own existence and statements, even as to strangers; but not usually of the truth of these statements. Id.

²Black on Judgments § 289.

³King v. Bates, 80 Mich. 367, and cases cited; Bailey on Jurisdiction § 174.

⁴Black on Judgments § 282.

⁵Black on Judgments § 287.

the existence of such facts may be denied and disproved collaterally to impeach the judgment;⁶ but the weight of authority seems to be the other way.⁷ I believe there is but one state, New York,⁸ in which it is held that the record of the judgment of a superior court may be impeached collaterally by contradicting and disproving the statements in the record. This rule is generally enforced though it be alleged that the record was fraudulently made up to appear as if jurisdiction had been obtained.⁹

⁶Freeman on Judgments § 133.

⁷Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742; Black on Judgments § 271; Freeman on Judgments § 132.

⁸Ferguson v. Crawford, cases 88.

⁹Van Fleet on Collateral Attack § 549; Haven v. Owen, 121 Mich. 51, 79 N. W. 938, and note to same case in 80 Am. St. Rep. 477.

4. VACATING, AMENDING, AND MODIFYING JUDGMENTS.

Review and Prospect, § 61.

Record and Judgment Distinguished, § 62.

What Courts May Vacate, Modify, and Amend Judgments,
§ 63.

What May be Vacated, Modified, &c., During the Term,
§ 64.

Common Law Remedies After the Term, § 65.

Modern Practice as to Relief after the Term, § 66.

Review and Prospect.

§ 61. We have thus far considered the nature and essentials, the kinds, and the record, of judgments; and we are now ready to take up the next general branch of our subject—vacating, amending, and modifying judgments. This topic we will consider under the following aspects: 1, what courts may vacate or modify; 2, what may be remedied before the end of the term at which judgment was rendered, and how; 3, what might be done after that term at common law; 4, what may be done after the term in modern practice.

Record and Judgment Distinguished.

§ 62. It seems really superfluous to remark that under this head we are not discussing amendments of the record, a topic given considerable attention when we were speaking of the record. But it is a fact, that amendments of the record and amendments of the judgment are often treated together in the most confusing manner by writers on this subject; and it is frequently impossible to tell from the reports of decisions whether the amendment under consideration was an amendment of the record or an amendment of the judgment. The judgment is the sentence of the law, the record its written his-

tory. The two are entirely distinct, and the rules concerning amendments of them are very different. Therefore, be it remembered that we are now concerned only with vacating and modifying the judgment.¹

1. What Courts May Vacate, Modify, and Amend Judgments.

§ 63. 1. Justices of the peace and similar inferior courts are generally held to possess no power to modify judgments they have rendered, except in so far as that power is conferred upon them by express statute. They cannot open their judgments, grant new trials or even set aside verdicts rendered by their juries.²

2. Only the court that rendered the judgment can modify or vacate it. The judge cannot do it during vacation. A court to which it has been taken by transcript cannot overhaul it.³ The legislature cannot by statute vacate it, for that is judicial action.⁴ Courts of supervision and review may reverse or annul judgments of lower courts, on appeal, error, *certiorari*, and the like; but that is an entirely different matter.

3. All superior courts of general jurisdiction possess the power to vacate, open, or modify their judgments on proper and seasonable application unless forbidden by statute. This power was conceded at common law to all the superior courts. It exists independent of any statute.⁵

2. What May be Vacated, Modified, etc., During the Term.

§ 64. Until the final judgment has been rendered the court may, on the application of anyone interested or even of

¹The whole of this topic, together with amendments of records, is treated in an article entitled: Opening, Amending, and Vacating Judgments, in 15 Ency. Pl. & Pr. 202-303; and this article, with a few alterations, is embodied in the article on Judgments and Decrees, 17 Am. & Eng. Ency. Law (2d ed.) 813-848.

²Justices of Peace, 12 Ency. Pl. & Pr. 738; Black on Judgments § 297.

³Nelson v. Guffey, 131 Pa. St. 289.

⁴Black on Judgments §§ 297, 298; Freeman on Judgments § 90; 15 Ency. Pl. & Pr. 230-233.

⁵Kemp v. Cook, 18 Md. 130, 79 Am. Dec. 681; Bronson v. Schulten, cases 103, 105.

its own motion, modify or undo anything it has done in the cause at the same or any previous term. Until the end of the term at which the final judgment is rendered, the judgment is said to be in the breast of the court, and the power above mentioned continues unabated, though a new trial has already been denied and a bill of exceptions settled.⁶ Moreover, the term lasts till the first day of the succeeding term unless the court sooner adjourns *sine die*.⁷

3. Common Law Remedies After the Term.

§ 65. But if the courts were permitted to keep causes within their power indefinitely, alternately changing from one side to the other, the remedy might be more intolerable than the wrong for which redress was sought. The interests of society demand that somewhere there should be an end of the controversy. Accordingly, the rule of the common law was that the cause passed beyond the power of the court with the ending of the term in which the final judgment was rendered, unless some proceeding to set aside the judgment had been commenced within that term and remained undisposed of.⁸ After that time the only recourse was by commencing a new action:⁹ 1, of attain, for relief against a false verdict; 2, of deceit, for relief against fraud in real actions; 3, of error, to remove the cause to a court of review to correct errors of law appearing on the face of its record; 4, of error *coram nobis* if the cause was in the king's bench, of error *coram vobis* if in the common pleas, by which errors of fact affecting the validity of the proceeding (such as that the defendant was insane, an infant, feme covert, or died before judgment) might be brought to the attention of the court that rendered the judgment, which

⁶Huber Mfg. Co. v. Sweny, 57 Ohio St. 169; Blum v. Wettermark, 58 Tex. 125. Or after the case has been removed to U. S. court and remanded. Jansen v. Grimshaw, 125 Ill. 468, 17 N. E. 850.

⁷Jasper v. Schlessinger, cases 3, 5; Freeman on Judgments § 90.

⁸Freeman on Judgments § 96; Black on Judgments § 306.

⁹All of the following actions are discussed in 3 Bl. Com. 402-411.

would thereupon give relief;¹ 5, of *audita querela*, to have the benefit of matter in discharge arising after judgment, or existing before and kept from the attention of the court by fraud of the other party;² or, 6, by bill for review in chancery, by which the extraordinary powers of the chancery were invoked to obtain relief from an unjust judgment suffered by reason of excusable mistake of fact, accident, or fraud.³

4. Modern Practice as to Relief After the Term.

§ 66. Such is the law to this day, except that in modern practice the relief obtained in all these numerous old actions is very generally granted on a simple motion in the court that rendered the judgment; and some further relaxations, the limits of which are not always clearly defined, have been introduced by statutes and custom differing in each state.⁴

¹Teller v. Wetherell, 6 Mich. 46, 49; Freeman on Judgments § 94.

²Freeman on Judgments § 95.

³Marine Ins. Co. v. Hodgson, 7 Cranch 332; Black on Judgments §§ 368-396.

⁴Bronson v. Schulten, cases 103.

5. THE EFFECT OF JUDGMENTS.

Review and Prospect, § 67.

Foundation and Origin of Estoppel by Judgments, §§ 68-71.

Why Judgments Estop, § 68.

Propositions Stated in the Duchess of Kingston's Case § 69.

The Three Essentials of an Estoppel—Plan of Treatment, § 70.

What Matters are Res Judicata, §§ 71-77.

Matters Classified and Distinguished, § 71.

What Causes of Action and What Defenses are Barred and

Why, §§ 72-74.

What Matters aside from the Claims, Counterclaims, and Defenses are Concluded, §§ 75-77.

Parties and Privies, §§ 78-82.

Judgments *in rem* Distinguished, § 78.

Plan of Treatment, § 79.

In What Suits Judgments bind Parties and Privies, § 80.

Who are Parties, § 81.

Who are Privies, § 82.

What is a Sufficient Judgment, §§ 83-89.

Plan of Treatment, § 83.

A Judgment, § 84.

Of a Court of Competent Jurisdiction, § 85.

Final, § 86.

On the Merits, § 87.

Subsisting, § 88.

In Personam, § 89.

Review and Prospect.

§ 67. Having considered: 1, the nature and essentials; 2, the kinds; 3, the record; and, 4, the vacating and modifying: we come now to consider, 5, the effect of judgments. Judgments have effect principally in two particulars: 1, in estopping; and, 2, in creating liens on property. The consideration of the effect of judgments in creating liens we will defer till we come to treat of the kindred liens created by attachments, garnishments, and executions. The effect of judgments in creating estoppels we will consider now.

FOUNDATION AND ORIGIN OF ESTOPPEL BY JUDGMENT.

Why Judgments Estop.

§ 68. *Res judicata* (a thing adjudicated) is the name usually given to the branch of the law we are now discussing. The rule that a judgment shall estop is one of necessity. Any other rule would render all trials mere mockery, and all disputes endless. As soon as any judgment had been rendered, a new action might be commenced to try the questions again, or to determine whether the first decision was correct, and so on *ad infinitum*. The repose of society and the security of every individual require that what has been definitely determined by a competent tribunal shall be accepted as indisputable. Therefore, *res judicata* may render that white which was black, and that straight which was crooked. Being a rule of necessity, it must always have existed; but we find it first fully and formally stated in the *Duchess of Kingston's Case*.¹ Concerning the propositions announced in the opinion in that case, a recent writer on the subject says, "For one hundred and nineteen years [since 1776] they have stood the test, and been copied with approval by every supreme court in the English-speaking world, and by every author who has treated upon the subject."²

The Propositions Stated in the *Duchess of Kingston's Case*.

§ 69. The following are the propositions referred to in the above comment: "What has been said at the bar is certainly true, as a general principle, that a transaction between two parties, in judicial proceedings, ought not to be binding upon a third; for it would be unjust to bind any person who could not be admitted to make a defense, or to examine wit-

¹Cases 109.

²Van Fleet's *Former Adjudications*, p. 4.

nesses, or to appeal from a judgment he might think erroneous. * * * From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: first, that the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, conclusive, between the same parties, upon the same matter, directly in question in another court; secondly, that the judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court, for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment."

Plan of Treatment—The Three Essentials to an Estoppel.

§ 70. There is an estoppel by judgment only: 1, (a) as to the cause of action and (b) the issues tried; 2, in a suit between the same parties, or to which they were privy, or *in rem*; and, 3, when the judgment is upon the merits, final, valid, and subsisting. There is no estoppel if *any* of these three requirements be wanting. Our consideration of this topic will therefore consist of a review of these three essentials, in the order named.

WHAT MATTERS ARE RES JUDICATA.

Matters Classified and Distinguished.

§ 71. Two distinct kinds of questions are *res judicata*: 1, the cause of action sued on and the defenses to it, the defendant's counterclaims and the defenses to them; and, 2, all matters directly in issue and necessarily decided, provided the court

deciding would have had jurisdiction to decide them in the connection in which they were afterwards presented as *res judicata*. The distinction between these is thus stated by Justice Field: "There is a difference between the effect of the judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim, or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. * * * But where the second action between the same parties is upon a different claim or demand the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict *was* rendered." He then proceeds to say that in the latter class of cases, "the inquiry must always be as to the point *actually* litigated and determined in the original action, not what *might have been* thus litigated and determined."³

We will now consider these two classes of matters in the order above named.

1. What Causes of Action and What Defenses are Barred and Why.

§ 72. Whether contested or not, a final judgment on the merits, by a court having jurisdiction: 1, extinguishes the whole cause of action sued on, by declaring that it does not exist or by making it over into a judgment; and, likewise, 2, extinguishes all counterclaims, by denying or allowing them;

³Cromwell v. County of Sac, cases 126, 127. See also: Freeman on Judgments § 249; Black on Judgments §§ 504, 506.

and, 3, extinguishes all defenses to all claims and counterclaims, by declaring that they do not exist or by making them into a judgment. Therefore, no demand set up by the plaintiff in his complaint, or by the defendant in his counterclaim, and prosecuted to judgment, and no defense to any claim or counterclaim, whether the defense was presented or not, can be taken into account in any other action between the same parties while that judgment stands. If the demand or counterclaim was denied it cannot be considered again, because the judgment proves that it is unfounded. If it was allowed in part only it cannot be considered again, because the judgment proves the remainder unfounded. As to the part allowed, or the whole if all was allowed, that cannot be considered again, because it has been made into a judgment in his favor or allowed as a payment on the demand against him. He asked that this be done. If a farmer requests a miller to grind his wheat and accepts the ground product he should not then ask for the return of his wheat also, and it would do him no good if he did. The situation is much the same in the case under consideration.

§ 73. . APPLICATION OF THE DOCTRINE OF MERGER. The doctrine of merger has often been discussed by courts and text-writers in this connection. There can be merger only into something greater. The smaller cannot contain the larger. Applying these principles, it has been held in England, that a debt on a bond was not extinguished by judgment being recovered thereon in a court not of record;⁴ and that execution might issue on a judgment in the king's bench after judgment recovered thereon in the common pleas.⁵ In other words, it was held that the judgment extinguishes only what is inferior to itself. On the same theory a few American courts have held a judgment not to be extinguished by another judgment being

⁴Higgins's Case, 6 Coke Rep. 44b, 45a, b.

⁵Preston v. Perton, Cro. Eliz. 817.

recovered thereon.⁶ But the majority of the American courts hold that the new judgment destroys the old,⁷ though rendered by a court of another state.⁸ Yet, there can be no merger, for the two are equal. Some have said the original cause is extinguished, because allowing a new suit would encourage useless litigation, vexatious to the defendant and without benefit to the plaintiff. That is a poor argument; for no one denies that the plaintiff may sue on his judgment at once if not paid, and again on his new judgment, and so on as often and as many times as he wishes. Mr. Freeman suggests, that to allow a judgment to remain and be enforced by execution after another judgment had been recovered on it, might enable a vast amount of property to be seized, sold, and absorbed in costs, on one small demand, to the ruin of the defendant.⁹ Yet, where it is held that the creditor may have as many judgments as he will, it is agreed that he can have but one satisfaction. That the claim has passed *in rem judicatam*, become a thing adjudicated, furnishes a sufficient reason in every case where the cause of action or defense is held to be barred, and no other reason will always answer; which convinces me that the only true foundation in every case is *res judicata*.

§ 74. ONLY THE CAUSE OF ACTION SUED ON AND DEFENSES TO IT ARE EXTINGUISHED. Therefore: 1, other persons' causes of action are not extinguished; 2, the plaintiff's other causes of action are not extinguished; and we may add a further qualification, 3, certain incidents of the plaintiff's cause of action remain. Of these in their order.

1. The rights of other persons are not extinguished by the judgment. Their rights are not in issue, cannot be tried; and it would not be just to cut them off without a trial. From this it necessarily follows that when the defendants are prin-

⁶Mumford v. Stocker, cases 480; Andrews v. Smith, 9 Wend. 53; Griswold v. Hill, 2 Paine (U. S.) 492, Fed. Cas. No. 5836; Weeks v. Pearson, 5 N. Hamp. 324.

⁷Freeman on Judgments § 216.

⁸Gould v. Hayden, 63 Ind. 443.

⁹Freeman on Judgments § 216.

cipal and surety they remain so as between themselves after judgment as before;¹ if they were tortfeasers, and therefore not entitled to contribution from each other, they are not entitled to contribution afterwards.² So, where a person has a right of action in two capacities, his recovery in one capacity will not bar his recovery in the other. So, a judgment against the maker of a note in favor of one indorser does not bar an action by another indorser who has paid the note.³

2. The plaintiff's other causes of action are not extinguished. To determine whether the cause of action sued on and the one on which judgment was formerly recovered are the same, often involves the perplexing question of separable and inseparable causes of action. We cannot go into the question here, otherwise than to say that only one judgment can be recovered for the one cause of action. The plaintiff cannot split up his demand. If he sues and recovers for a part his right to the remainder is gone. But, on the other hand, the plaintiff may have several causes of action against the same debtor, and suit and recovery upon one does not extinguish the right to sue and recover upon the others. Where a right of action is joint and several by the original agreement, or is made so by statute, suit and recovery of judgment against one does not bar the future action against the others. So, too, when a mortgage or a note of a third party is given as security for a debt, judgment against the third party on the note, or decree foreclosing the mortgage, does not extinguish the debt.⁴ Likewise, taking judgment against a garnishee does not extinguish the principal judgment.⁵

¹*Fairchild v. Lynch*, 99 N. Y. 359, 2 N. E. 20. Under the general issue, in debt on judgment brought against the surviving debtor, it was held error to exclude evidence that defendant was only surety on the original debt and had released his security relying on plaintiff's statement that the debt had been paid. *Carpenter v. King*, 50 Mass. (9 Metc.) 511, 43 Am. Dec. 405. Same effect, *Rice v. Morton*, 19 Mo. 263, and cases cited.

²*Percy v. Clary*, 32 Md. 245.

³*Freeman on Judgments* § 227a.

⁴*Burnheimer v. Hart*, 27 Iowa 19, 99 Am. Dec. 641; *Evansville Gas-Light Co. v. State*, 73 Ind. 219, 38 Am. Rep. 129.

⁵*Brice v. Carr*, cases 261.

3. Certain incidents of the plaintiff's original demand remain incidents of the judgment. In many cases courts will look behind the judgment to discover on what it is based, to the end that it may be correctly interpreted.⁵ For example, if the debt sued on was the purchase price of a homestead, the homestead would not be exempt from execution on the judgment, and generally the taking of judgment on a debt does not release the security for that debt.⁶

2. What Matters Aside from the Claims, Counterclaims, and Defenses are Concluded.

§ 75. Having determined what causes of action, counterclaims, and defenses are barred by the judgment, we now ask, Upon what matters does the judgment conclude the parties in another action upon a *different* claim? The answer to this question is thus given by Judge Van Fleet in his recent treatise on this subject: "From the numerous conflicting decisions, I have deduced what seems to me to be the correct principles, and give them for what they are worth." * * *

§ 76. "COLLATERALLY IN QUESTION, OR DIRECTLY UPON THE POINT. Among other things, it was said in the *Duchess of Kingston's Case* that the judgment of a court of concurrent jurisdiction, 'directly upon the point,' was conclusive upon the same matter directly in question in another court; but that the judgment of no court was evidence of any matter which came 'collaterally in question.' The principle involved in these two rules seems quite plain, nevertheless the cases differ in their application. Much of the difficulty arises, as it seems to me, from confusing the words, 'point,' 'matter,' and 'question,' with the word 'issue.' A suit may involve but a single issue, and

⁵Freeman on Judgments § 215.

⁶White v. Simpson, 107 Ala. 386, 18 South. 151; Muncie Nat. Bank v. Brown, 112 Ind. 474; McCullough v. Hellman, 8 Ore. 191; Fisher v. Fisher, 99 Mass. 303.

yet the points, matters, and questions of law and fact, which tend to sustain its affirmative or negative, may be numerous. It is the affirmative or negative of this issue which the respective parties bend all their energies to sustain, and which is the matter 'directly' under consideration; while the evidence introduced, and the subsidiary questions of law and fact which they seek to establish in order to determine the issue in controversy, are matters 'collaterally in question,' which do not become things adjudicated. For instance, in a contest over a will, in which the sole issue is soundness or unsoundness of mind, there may be a hundred matters of controversy, and the jury may be required to determine that many questions by answers to special interrogatories; nevertheless, all these questions are merely collateral, and cannot be used as evidence between the same parties in another cause."⁸

§ 77. INFERABLE BY ARGUMENT. It was said in the *Duchess of Kingston's Case* that "neither the judgment of a concurrent nor exclusive jurisdiction is evidence * * * of any matter to be inferred by argument from the judgment." This statement means that the judgment is not evidence of any matter in issue, which probably was, but might or might not have been, the true ground of recovery."

2. PARTIES AND PRIVIES.

Judgments in Rem Distinguished.

§ 78. Having considered at some length the matters to which the estoppel relates, we come now to consider what persons are estopped. In this connection, it becomes important to distinguish between judgments *in rem* and judgments *in personam*, and between the cause of action and the issues

⁸Van Fleet's Former Adjudications, p. 27. Compare: Freeman on Judgments §§ 256, 257.

⁹Kitson v. Farwell, cases 123; Freeman on Judgments § 258.

decided, as already explained. Judgments *in personam* are those establishing or denying claims or obligations of persons. Judgments *in rem* are those fixing the status of things. The same judgment may be *in rem* and *in personam*. Thus, when a person contests the probate of a will and it is received for probate, the judgment is *in personam* and *in rem* as to him, and it is *in rem* as to all who did not become parties to the proceedings. He is bound as to the issues decided, and also as to the cause of action. Those who did not become parties are bound only as to the cause of action. As to the matters decided, a judgment *in rem* concludes no one but those who became parties, and as to them it is a judgment *in personam* also. But as to the cause of action, which in such cases is always to fix the status of the thing, it binds everyone in the world if it be *in rem* generally; or if it be *in rem* as to certain persons, such as attachments without personal service or appearance, it binds them and their privies. With this much to distinguish proceedings *in rem*, let us see who are bound by judgments *in personam*.

Plan of Treatment.

§ 79. We have already learned that judgments *in personam* operate as *res judicata* only in suits between the same parties or their privies. Therefore, nothing remains to be said except to determine: 1, in what suits judgments bind parties or their privies; 2, who are parties; and, 3, who are privies. Of these in their order.

In What Suits Judgments Bind Parties and Privies.

§ 80. 1. A judgment neither binds nor benefits strangers. Strangers are not bound, because they have had no day in court. A judgment never binds parties in their actions with strangers, because it would be unjust that anyone should bind another by a trial in which he himself was not exposed to the peril of

being equally bound if the judgment had been the other way.¹

2. For the same reason, there is no estoppel between the parties themselves unless both are bound by the judgment, as the defendant would not be in cases of attachment without service or appearance. The estoppel must be mutual.²

3. Parties to an action who were not adversaries are not bound to each other by the judgment therein. A judgment in favor of A, against B and C, is not *res judicata* between B and C, because their rights were not in issue and could not be tried.³

4. A party is not estopped or benefited by an earlier judgment in which he sued the other party or was sued by him in a different capacity.⁴

5. There is a difference of opinion as to whether judgments operate as *res judicata* in subsequent actions between the same parties on one side and *some* of the parties on the other. But the majority of the courts favor applying the estoppel.⁵

6. A similar difference of opinion exists where new parties are added on either side. As to the cause of action, the party claiming it would seem to be estopped, because it is barred by or changed into the judgment, and the strangers could not object. But as to the issues tried, the new party is not bound, and why should the opposite party be?⁶

Who are Parties.

§ 81. Judgments and decrees are conclusive only between parties and privies therto. According to Greenleaf, "those are held to be parties who have a right to control the proceedings, to make defense, to produce and cross-examine witnesses, and to appeal from the decision if appeal lies."⁷ This statement

¹Freeman on Judgments § 154; Black on Judgments §§ 534, 600.

²Freeman on Judgments § 159.

³Freeman on Judgments § 158; Black on Judgments § 599.

⁴Leggott v. Great N. Ry. Co., 1 Q. B. Div. 599; Freeman on Judgments § 156; Black on Judgments § 536.

⁵Freeman on Judgments § 160; Black on Judgments § 543.

⁶Freeman on Judgments § 161; Black on Judgments § 544.

⁷1 Greenleaf on Evidence, § 535; Ruff v. Ruff, cases 121.

may be agreed to if it be understood that the persons mentioned have been brought into court by due service of process, or have voluntarily entered appearance, or are actually present and participating in the proceedings, in person or by attorney. The record will usually show who the parties were; but a party suing, sued, prosecuting, or defending, by a wrong name or in the name of another, is as much estopped by the judgment as if he had been named in the record;⁸ and parol evidence is competent to show his connection with the proceedings.⁹ But the person in whose name the action was brought is not bound by the judgment if he had not the rights of control above mentioned.

Who are Privies.

§ 82. If a person is bound by a judgment, as a privy to one of the parties, it is because he has succeeded to some right, title, or interest of that party in the subject matter of the litigation, and not because there is privity of blood, law, or representation between them, although privity of the latter sort may also exist. It must, also, be remembered that privies are not as such, estopped as to the issues tried beyond controversies affecting their estate in the subject of the action. In order to create this relationship two requisites must exist. In the first place, the person who is to be thus connected with the judgment must be one who claims an interest in the subject affected, *through* or *under* one of the parties. In the second place, privies, in such sense that they are bound by the judgment, are those who acquired their interest in the subject matter *after* the commencement of the action; if their title or interest attached before that time, they are not bound unless made parties. He who takes title through a party while a suit is pending concerning the property, takes it subject to the judgment that

⁸Black on Judgments §§ 537-541.

⁹Res Judicata, 21 Am. & Eng. Ency. L. (1st ed.) 141.

may thereafter be rendered in that suit.¹ But neither a party nor a privy is estopped by the judgment from setting up a title acquired from a stranger too late to be tried in the action.²

3. WHAT IS A SUFFICIENT JUDGMENT.

Plan of Treatment.

§ 83. In all that has been said up to this point, a sufficient judgment has been presumed. We must now determine what is a sufficient judgment to operate as an estoppel as to the cause of action and the issues tried. The essentials may be summed up by saying that there must be: 1, a judgment; 2, of a court of competent jurisdiction; 3, final; 4, on the merits; 5, subsisting; and, 6, *in personam*. Let us review these in the order named.

1. A Judgment.

§ 84. A verdict does not estop. There must be judgment. Action may be maintained and judgment recovered notwithstanding a prior verdict found in another action between the same parties on the same demand, whether that verdict sustained or denied the claim, and the issues tried are still open to dispute.³ In England it is held that the creditor who has recovered judgment in another country may sue on the original demand or on the judgment at his option.⁴ But in Louisiana the original demand was held to be extinguished by the judgment in a foreign country;⁵ and the rule is always

¹Freeman on Judgments § 162; Van Fleet's Former Adjudication, p. 910; Black on Judgments § 549; Res Judicata, 21 Am. & Eng. Ency. L. (1st ed.) 139.

²Freeman on Judgments § 329.

³Black on Judgments § 682; Freeman on Judgments § 251; Van Fleet's Former Adjudication, pp. 119-121. Compare: *Lehmann v. Farwell*, cases 392.

⁴Freeman on Judgments § 220; Black on Judgments § 847.

⁵*Jones v. Jamison*, 15 La. Ann. 35. See also *Wood v. Gamble*, 11 Cush. (Mass.) 8, 59 Am. Dec. 135.

applied in the United States as to judgments rendered in one of the states.⁶ Thus, when a debtor had some property in New Hampshire and some in New York, but not enough in either place to satisfy the whole claim, it was held, that, by suing and taking judgment in New York while his action was pending in New Hampshire, the creditor barred the further prosecution of his original action in New Hampshire.' In England and America, it is now settled that a foreign judgment sustaining or denying the claim is conclusive as to the validity and amount of the demand;⁷ and it should, therefore, be held to bar a new recovery on the original demand. The same reasons which make foreign judgments conclusive as to the cause of action make them conclusive as to the issues decided.⁸

2. Of a Court of Competent Jurisdiction.

§ 85. If the court had not jurisdiction of the particular case before it its judgment is of no effect for any purpose, as we have seen. But if the court had jurisdiction a judgment of a justice of the peace, though rendered in another state,¹ is as binding concerning the cause of action as the judgment of a court of last resort would be, and it matters not that it is erroneous.² What has just been said has reference to the cause of action. The rule as to the effect of a judgment as an estoppel concerning the issues decided is different. In this respect there is a distinction made, depending on the scope of the jurisdiction of the court rendering the judgment. In the *Duchess of Kingston's Case* it is said to turn on the jurisdiction being *exclusive* or *concurrent*. As to this Judge Van Fleet says: "But I do not think the exclusiveness was of any moment. It

⁶Freeman on Judgments §§ 220, 221.

⁷Child v. Eureka Powder Works, 45 N. Hamp. 547.

⁸Black on Judgments §§ 825-834; Merger, 15 Am. & Eng. Ency. L. (1st ed.) 340; Hilton v. Guyot, 159 U. S. 113, Dwyer's Cases Int. L. 310.

¹Res Judicata, 21 Am. & Eng. Ency. L. (1st ed.) 281.

²Ault v. Zehering, 38 Ind. 429.

³Black on Judgments §§ 522, 681; Van Fleet's Former Adjudication, p. 96; Rood on Garnishment § 215.

seems to me that it was the completeness of the jurisdiction which gave conclusive force to the adjudication in other courts. In other words, if the jurisdiction had been concurrent in several courts, as frequently happens in America, the adjudication would have been none the less conclusive. If an issue is directly made in any court which has complete jurisdiction to determine it, the adjudication is conclusive in all other judicial proceedings. * * * The correct principle involved, in my opinion, in the phrase 'court of concurrent jurisdiction,' was first formulated by a British court sitting in India, as follows: 'In order to make the decision of any court final and conclusive in another, it must be a decision of a court which would have had jurisdiction over the matter in the subsequent suit in which the first decision is given in evidence as conclusive.' * * * Thus, if the same instrument purports to convey a horse and a tract of land, and the purchaser, relying upon it as his sole evidence of title, replevies the horse before a justice of the peace, that officer must determine its validity. But his determination cannot be used as evidence in a contest over the real estate over which he had no jurisdiction."³

3. Final.

§ 86. The same reasons which require that the verdict should not, by itself, be regarded as conclusive, are equally applicable to interlocutory judgments and decrees. Moreover, the court that rendered them may modify them at any time, and they should not be more conclusive in other courts. Such orders do not bar another recovery for the same cause,⁴ and do not estop as to the issues decided.⁵

³Van Fleet's Former Adjudication, pp. 29, 30, 31. Compare: Hibshman v. Dulleban, cases 119; Black on Judgments § 516.

⁴Black on Judgments § 695; Freeman on Judgments § 251.

⁵Black on Judgments § 509.

4. On the Merits.

§ 87. The estoppel of a judgment is confined to those matters actually decided. Therefore, a judgment for the defendant, because the court had no jurisdiction to hear his complaint or grant him relief, or because he has misconceived his action, or has not brought in the proper parties, or has not set the cause forth in proper form, or has sued prematurely, will not prevent his prosecuting a new action in a competent court, on a sufficient complaint, against the proper parties, for the same cause, after it has matured. But as to the matters actually decided by such final judgment, the parties are as much bound as by any other judgment.⁶

5. Subsisting.

§ 88. If the judgment is set aside or in any way annulled, the cause of action on which it was rendered comes to life again, the same as if no judgment had ever been rendered.⁷ But no such effect is produced by merely staying the enforcement of it, or taking an appeal from it,⁸ or moving for a new trial.⁹ In most states the parties are held to be estopped as to the issues decided, though an appeal be pending.¹

6. In Personam.

§ 89. A judgment by which the defendant is not bound does not merge the cause of action. For example, if judgment be recovered in attachment without personal service, though the attached property is bound by the judgment, the defendant is not; and, for any balance remaining unpaid by the proceeds of the attached property, the creditor may main-

⁶Freeman on Judgments §§ 260-269; Black on Judgments §§ 693-719.

⁷Black on Judgments § 683; Goodrich v. Bodurtha, 72 Mass. (6 Gray) 323; Fries v. Pa. Ry. Co., 98 Pa. St. 142. Reversal as to one defendant enables new action against all. Maghee v. Collins, 27 Ind. 83.

⁸Cloud v. Wiley, 29 Ark. 80; Bank of N. A. v. Wheeler, 28 Conn. 433. 73 Am. Dec. 683.

⁹Young v. Brehe, 19 Nev. 379, 12 Pac. 564.

¹Van Fleet's Former Adjudication, p. 126.

tain an action on the original demand.² Likewise, judgments rendered against all the debtors when only part of them are served, which is permitted by statute in several states, does not extinguish the demands sued on, for those not served are not bound by the judgment; and afterward the creditor may sue the others or all on the original cause of action.³ Yet, if only a part are sued when all might have been, the judgment against them extinguishes the cause of action, and the plaintiff cannot hold the others afterward.⁴ As to the issues tried, we have already seen that there is no estoppel in any action merely *in rem*, because the estoppel must be mutual, and, as those who do not become parties are not estopped, they cannot set up the estoppel against those who have become parties.

²National Bank v. Peabody, 55 Vt. 492, 45 Am. Rep. 632; Oil Well S. Co. v. Koen (Ohio), 60 N. E. 603.

³Mason v. Eldred, 73 U. S. (6 Wall.) 231; Merchants' Cases Partn. 343; Bonesteel v. Todd, 9 Mich. 371, 80 Am. Dec. 90; Stone v. Wainwright, 147 Mass. 201.

⁴Freeman on Judgments §§ 231, 232.

6. SATISFACTION OF JUDGMENTS.

Plan of Treatment, § 90.

A. PROCESSES TO OBTAIN SATISFACTION, §§ 91-212.

1. *Nature of the Processes*, §§ 91-104.

2. *Issuing the Processes*, §§ 105-147.

3. *Execution of the Processes*, §§ 148-212.

B. WHAT CONSTITUTES A SATISFACTION, §§ 213-220.

C. RIGHTS AFTER SATISFACTION, §§ 221-225.

Plan of Treatment.

§ 90. We have considered: 1, the nature and essentials; 2, kinds; 3, record; 4, vacating and modifying; 5, effect; and are now ready to take up the last grand division of our subject, 6, the satisfaction of judgments. Most of the questions that arise in this connection concern the processes used to enforce satisfaction. These, we will first consider. When we have finished the consideration of these, we will consider a few minor matters concerning satisfaction, aside from the processes used to enforce. In considering the questions which arise in the use of the means of enforcing we will inquire: 1, concerning the nature and kinds of processes by which judgments are enforced; 2, concerning the questions that arise in issuing the processes; 3, concerning the questions that arise in executing the processes.

A, PROCESSES TO OBTAIN SATISFACTION.

I. NATURE OF PROCESSES.

What Judgments need no Execution, § 91.

Enforcement by Coercion, § 92.

Execution by an Officer Under Process of the Court, § 93.

Various Processes Used to Enforce Judgment, §§ 94-104.

Plan of Treatment, § 105.

What Judgments Need no Execution.

§ 91. The judgment has been said to be the end of the law in regard to the controversy; and such it is whenever it declares the existing status to be the just one. So, too, where the judgment or decree is self-executing, which I believe it to be whenever the thing awarded is not capable of manual delivery. For example, a process to take an office from one man and give it to another would be a troublesome thing to execute. The sheriff could hardly convince the one party that he had received or the other that he had been disrobed of it. But in most cases the judgment would amount to nothing if the law did not provide means of putting it into effect.

Enforcement by Coercion.

§ 92. Satisfaction of judgments and decrees may be enforced: 1, by coercing him against whom the judgment or decree is pronounced till he satisfies it; 2, by an officer putting the judgment into effect under the direction of the court. The coercion may consist of imprisoning the defendant or seizing and holding his property or both. At one time, this means of enforcement was available on every judgment at law, and was the only means of enforcing decrees of the court of chancery. Now, we have statutes rendering decrees enforceable in any

way that a similar judgment might be enforced; and coercion is not now available to enforce satisfaction of any judgment for the payment of money merely, except in certain cases specified in the statute, and usually is confined to judgments for torts, frauds, or misconduct in office. But this is the usual method of enforcing the final orders at law in the extraordinary actions—mandamus, procedendo, prohibition, habeas corpus, etc. Attachment is the generic term applied to all writs designed to coerce obedience or punish for contempt; and this was the only sense in which the word was used by the courts until the modern practice was introduced, of seizing property belonging to the defendant and holding it to furnish a fund for the satisfaction of a judgment yet to be rendered.

Execution by an Officer under Process of the Court.

§ 93. All the judgments in the ordinary actions at law which need putting into effect, may be executed by the court's officer without attempting to coerce the defendant to satisfy them. The judgments in these actions which may require execution are: 1, for a sum in money, as in *assumpsit*; 2, for a specific chattel, as in *replevin*; 3, for a specific parcel of land, as in *ejectment*; 4, for any combination of these, as when in *replevin* judgment for defendant is given for costs in money, for the return of the specific chattel, and if the chattel cannot be had, then for a specified equivalent in money. The execution which may issue upon any judgment will depend upon the class to which the judgment belongs, for the execution must correspond to the judgment to be enforced.

The Various Processes used to Enforce Judgments.

§ 94. EXECUTION is the act of putting something into effect. Every process issued with a view of putting a judgment into effect may properly be termed an execution. Even attachment, garnishment, *replevin*, and other writs designed

to provide in advance for the satisfaction of the judgment, are, in one sense, only anticipatory executions. All of these are sufficiently embraced in the definition of an execution as the command of the law made by the court in writing, solemnly directing the judgment to be put into effect, and usually specifying the method of proceeding with greater or less certainty. The following are some of the principal writs partaking of the nature of an execution.

§ 95. REPLEVIN, a common law action, demands mention here, because its original process is in effect an execution, commanding the officer to make immediate restitution to the plaintiff and at the same time to summon the defendant to answer the plaintiff in court. Here we have the relief granted first, and the right to it tried afterward. This was the only common law action in which relief was given before judgment.

§ 96. ATTACHMENT, in its most comprehensive sense as a legal term, means: 1, the act of taking the body or effects of any person into custody and so holding the same to abide the further orders of the court; or, 2, any process commanding such acts to be done. Any process commanding the taking of the body is called a *capias*. The most common attachment of this kind is the *capias ad respondendum*, commanding the officer to arrest and detain the defendant till he enters appearance in the action with bond to satisfy whatever judgment may be recovered therein. At the present time the most common attachment is the one commanding the officer to seize property of the defendant to a specified amount and hold it, the purpose being to order it sold when judgment is rendered, and to apply the proceeds in satisfaction of the judgment.

§ 97. GARNISHMENT consists of notifying someone to retain something he has belonging to the defendant, to make disclosure before the court concerning it, and to dispose of it as the court shall direct. A person so summoned is called a garnishee. The proceeding has been likened to a subpoena to

a witness, in that it is a summons to give testimony in an action between others upon being paid the mileage and fees of a witness.¹ In another aspect it has been seen to resemble an injunction against disposing of property, the disobedience of which is a contempt of court for which the garnishee may be punished.² Again, it may be compared to an order appointing a receiver; for when served the property in his possession is in the custody of the law, and the garnishee is merely the hand of the court, even as a sheriff holding property under an attachment or an execution.³ The garnishing creditor discerns in it only an attachment or execution ancillary to his action or to enforce his judgment. He sees in the garnishee an officer of the court holding the property under his writ, for which he is seeking to compel the garnishee to account. But the garnishee sees in it an action against him by his creditor for the benefit of his creditor's creditor—an action commenced by filing a sworn complaint (the garnishment affidavit), issuing and serving a summons to appear and defend, liable to be followed by a judgment for default if he does not plead within the prescribed time, likely to result in issue being joined and trial demanded if he appears and denies the complaint, which action despite his stoutest defense may lead to a judgment against him, enforceable by seizing and selling any of his property not exempt from execution, as any other judgment would be. These partial resemblances remind us of Saxe's Hindoo tale of the four blind men and the elephant, and show how unlike anything but itself garnishment is. Under some statutes garnishments issue ancillary to an execution; under others, ancillary to an attachment; under others, independently, as a form of attachment if before judgment, as a form of execution if after judgment. The student should consult the statutes of

¹Rood on Garnishment §§ 181, 269.

²Lilienthal v. Wallach, 37 Fed. Rep. 241; Johann v. Rufener, 32 Wis. 198.

³Stiles v. Davis, 66 U. S. (1 Black) 101.

his state to ascertain in which of these forms they authorize the proceeding.

§ 98. *FIERI FACIAS* (FI. FA.) is an execution commanding the sheriff, or other officer addressed, to seize and sell enough of the defendant's property to satisfy a judgment therein specified with the amount, and to bring the proceeds into court. This is one of the oldest, and to this day one of the most common of all writs of execution. At the common law, only goods and chattels could be taken and sold under this writ;⁴ but in this country since 1732,⁵ the fee or any other legal estate in lands may be seized and sold under a *feri facias* against the owner. In some states the land can be sold only in case there is a bid for it at the sale equal to a certain per cent of the value fixed by the appraisers at the time of the levy, and in others it can be levied on only in case sufficient chattels liable to execution cannot be found.⁶

⁴Harbert's Case, cases 137. Blackstone says a term for years could be sold as a chattel under a fi. fa. at the common law. 3 Bl. Com. 417. Now, in England, by statute, 27 and 28 Vic., 1864, freeholds delivered in execution to the creditor may be ordered sold.

⁵STATUTE 5 GEO. II., CAP. 7, § 4 [A. D. 1732].—Whereas his Majesty's subjects trading to the British plantations in America lie under great difficulties, for want of more easy methods of proving, recovering and levying of debts due to them, than are now used in some of the said plantations: and whereas it will tend very much to the retrieving of the credit formerly given by the trading subjects of Great Britain to the natives and inhabitants of the said plantations, and to the advancing of the trade of this kingdom thither, if such inconveniences were remedied; may it therefore please your Majesty * * *

IV. And be it further enacted by the authority aforesaid, That from and after the said twenty-ninth day of September, one thousand seven hundred and thirty-two, the houses, lands, negroes, and other hereditaments and real estates, situate or being within any of the said plantations belonging to any person indebted, shall be liable to and chargeable with all just debts, duties and demands of what nature or kind soever, owing by any such person to his Majesty, or any of his subjects, and shall and may be assets for the satisfaction thereof, in like manner as real estates are by the law of England liable to the satisfaction of debts due by bond or other specialty, and shall be subject to the like remedies, proceedings and process in any court of law or equity, in any of the said plantations respectively, for seizing, extending, selling or disposing of any such houses, lands, negroes, and other hereditaments and real estates, toward the satisfaction of such debts, duties and demands, and in like manner as personal estates in any of the said plantations respectively are seized, extended, sold or disposed of, for the satisfaction of debts.

⁶IN ILLINOIS the plaintiff may elect as to what shall be taken, "provided personal property shall be last taken." Hurd's Stat. (1899) p. 1049, § 11.

§ 99. *CAPIAS AD SATISFACIENDUM* (CA. SA.) is an execution commanding the officer to arrest and imprison the defendant till the judgment against him is satisfied.

§ 100. *LEVARI FACIAS* was an execution allowed by the common law, to be issued by a superior or an inferior court, commanding the sheriff to seize the defendant's property and hold it till the judgment was satisfied. Under this writ the sheriff could seize all the defendant's goods, and take the rents and profits of his lands; but he could not sell or apply the property to a satisfaction of the judgment, and the possession of the land itself could not be taken.⁷ This writ is very little used in America.⁸

§ 101. *EXTENDI FACIAS* was an execution allowed upon recognizances in certain cases. Under this writ the body, goods, and all the lands of the debtor could be taken.⁹

§ 102. *ELEGIT* was an execution taking its name and origin from the Statute of Westminster 2d, c. 18, 13 Edw. I, A.D. 1285, which provides that when debt is recovered or acknowledged in the king's court, or damages awarded, the creditor may elect to have a *feri facias* or a writ commanding the sheriff to deliver to him all the chattels of the debtor and half of his land. Under this writ the chattels were appraised and delivered to the creditor as a payment on the debt, and the land was appraised and half of it delivered for such a term as would be necessary to get the balance of the judgment from the rent at the appraised value. The creditor so in possession was called the tenant by *elegit*. Though no land could be found the chattels could not be sold under this writ but must be appraised and delivered in payment.¹ This writ is still in use in some of the eastern states.

⁷3 Bl. Com. 417; Coke's Second Inst., Vol. 1, p. *395.

⁸Freeman on Executions § 6.

⁹3 Bl. Com. 420.

¹Glascoccke v. Morgan, 1 Kibble 556; Bacon Abr., Execution C. 2.

§ 103. HABERE FACIAS SEISINAM, or writ of seisin of a freehold, and *habere facias possessionem*, or writ of possession of a term, were executions by which the sheriff of the county where the land lay was commanded to put the plaintiff into actual seisin or possession of the land awarded by the judgment.

§ 104. RETORNO HABENDO was an execution on a judgment in favor of the defendant in replevin, and by it the sheriff was commanded to return the replevined chattels.

It is scarcely profitable to review the old writs further, since the general name execution covers all, and a writ appropriate to the judgment to be enforced will be issued in every case.

2. ISSUANCE OF THE PROCESS.

Plan of Treatment, § 105.

1. What is Issuing the Process, § 106.
2. On What Demands the Processes May Issue, §§ 107-112.
Executions, § 107.
Attachments and Garnishments, §§ 108-112.
3. At What Stage of the Case the Processes May be Issued, §§ 113-119.
Garnishments, § 113.
Attachments, § 114.
Executions, §§ 115-119.
4. Effect of Use of One Process on Right to Another, § 120.
5. Who May Demand and Control the Processes, §§ 121-125.
Every Person Owning a Claim, § 121.
Only Persons Interested in the Claim, § 122.
Writs Issued on Others' Orders are Valid, § 123.
Remedies of Persons Injured, § 124.
Form of Demand and Proof of Authority, § 125.
6. Against Whom the Processes May be Issued, §§ 126-129.
Parties only, § 126.
All Defendants, § 127.
Any Person May be Garnished, § 128.
Limitations upon the Right to Process, § 129.
7. What Courts and Officers May Issue the Processes, §§ 130-133.
Every Court May Enforce its Judgment, § 130.
No Court Can Issue Process on Judgments of Other Courts, § 131.
When Process from Other Courts is Authorized, § 132.
Only by the Proper Officer, § 133.
8. Form and Essentials of the Papers, §§ 134-147.
Attachment and Garnishment Affidavits, §§ 134-139.
Attachment Bonds, § 140.
Forms and Essentials of the Processes, §§ 141-147.

Plan of Treatment.

§ 105. Having reviewed briefly the nature of the processes by which judgments are enforced, I come now to consider the questions which arise in issuing the processes; and should like to take them up in the order in which they would arise in the prosecution of the suit; but the arrangement of the questions must be somewhat arbitrary, because issuing the process

is but one transaction, and such questions as are presented arise substantially at the same time.

To many the treatment of attachments, garnishments, and the numerous forms of execution together will seem monstrous at first, because they are accustomed to seeing them treated separately. Indeed, there are some matters peculiar to each, which will have to be specified from time to time as we proceed. But no one can fail soon to discover that most of the rules stated apply to all processes alike, and that to restate them as to each would be worse than useless repetition, for in that way the true scope of the rules would not be shown.

The principal questions which can arise in issuing processes to enforce judgment are the following: 1, what is issuance of the process; 2, on what demands the processes may be issued; 3, at what stage of the case the processes may be issued; 4, the effect of the use of one process on the right to use another; 5, who may demand and control the issuance of the processes; 6, against whom the processes may be issued; 7, what courts may issue the processes; 8, the form and essentials of the affidavits, writs, and other papers. I will now take up each of these questions in the order named.

1. WHAT IS ISSUING THE PROCESS.

§ 106. It is issuing the process that gives it life and effect. Writing, signing, and sealing it are only preliminary acts. It is so issued as to give it effect as an issued process only when it has been put into the custody of the officer who is to execute it.¹ Indeed, it is not then issued if it is accompanied by orders not to execute till some later time.²

¹Gowan v. Fountain, Cases 145; Alderson on Writs § 8; Freeman on Executions § 9a.

²Smallcomb v. Cross, cases 445; Waters v. Harman, 22 Wend. 566.

2. ON WHAT DEMANDS THE PROCESSES MAY ISSUE.

Executions.

§ 107. In England executions might issue on recognizances in certain cases; and in America we often find statutes providing, that, on certain bonds filed in judicial proceedings, executions may issue at once upon breach of the condition of the bond. But the general rule is that execution can be issued only on a final, subsisting judgment.³ But, on the other hand, execution may be issued on any final, subsisting judgment, as a matter of course, though not expressly awarded by the judgment, or even though some other means of getting satisfaction be specified.⁴

Attachments and Garnishments.

§ 108. LIMITATIONS ENUMERATED. Attachments and garnishments, because unknown to the common law, may be issued only in cases falling within the terms of the statutes authorizing these proceedings.⁵ From this fact arise three important limitations upon the use of these processes: 1, as to the form of action in which they may be issued; 2, as to the character of the obligation to enforce which they may be issued; 3, as to the grounds or exigencies which most statutes require to exist before these processes, more particularly attachment, can be issued. Of these in the order named.

§ 109. AS TO THE FORM OF ACTION. Wherever the code provides for but one form of action, and abolishes the old forms, this consideration is entirely eliminated.⁶ In the states where there are several forms of action, it is important to

³Locke v. Hubbard, cases 9; Brightman v. Merriwether, cases 8; Jasper v. Schlessinger, cases 3; Freeman on Executions § 16.

⁴Roberts v. Connellee, cases 78; Freeman on Executions § 16.

⁵Drake on Attachment § 10; Rood on Garnishment § 13.

⁶All civil actions are reduced to one form in the following states and territories: Arizona: Rev. Stat. (1887) §§ 649, et seq. Arkansas: Dig. of

observe that attachment and garnishment are available only in such as the statutes permit.⁷

§ 110. AS TO THE CHARACTER OF THE OBLIGATION. The most general limitation observed in the statutes is that they do not extend the use of these processes to actions brought to recover specific property.⁸ Such proceedings might be useful in such actions when judgment is allowed for the value in case the property itself cannot be found, and to secure the costs in other cases, but otherwise they are not adapted to the purpose of such actions. Next to this the most general limitation is that the statutes do not make the processes available in actions to recover damages arising from torts; but in a few states they are allowed in such actions generally, or for certain specified torts.⁹ The statutes in most states provide for attach-

Stat. (1894) §§ 5604, 5605. California: Code Civ. Proc. § 307. Colorado: Code § 1. Connecticut: Gen. Stat. (1888) § 872. Florida: Rev. Stat. (1892) §§ 1007, 1009. Georgia: Code (1882) § 3252. Idaho: Rev. Stat. § 289. Iowa: Rev. Code (1888) § 2507. Kansas: Gen. Stat. (1889) § 4087. Kentucky: Code (1888) §§ 4, 5. Minnesota: Gen. Stat. (1894) § 5131. Missouri: Wag. Rev. Stat. § 1089. Montana: Code Civ. Proc. (1895) § 460. Nebraska: Code Civ. Proc. § 2. Nevada: Gen. Stat. § 3023. New York: Code Civ. Proc. § 3389. North Carolina: Code § 133. North Dakota: Rev. Code (1895) § 5265. Ohio: Rev. Stat. (1892) § 4971. Oklahoma: Gen. Stat. (1893) § 3882. Oregon: Code Civ. Proc. (1892) § 1. South Carolina: Code Civ. Proc. (1893) § 89. South Dakota: Utah: Rev. Stat. (1898) § 2852. Washington: Bal. Code & Stat. (1897) § 4793. Wisconsin: Ann. Stat. (1898) § 2600. Wyoming: Rev. Stat. (1887) § 2360.

⁷Ferris v. Ferris, cases 147; Strock v. Little, cases 148; Ill. Cent. R. Co. v. Weaver, cases 149; Esler v. Kent, Circuit J., cases 151.

⁸In Arkansas attachments are allowed in actions to recover personal property which cannot be obtained because concealed, removed, or disposed of. Dig. of Stat. (1894) § 325.

⁹In the following states statutes authorize attachments and garnishments in actions *ex delicto*: Alabama: Code (1896) § 524; Atkinson v. James, 96 Ala. 214. Arizona: Laws, 16th Session (1891), No. 27. Connecticut: In divorce suits; Gen. Stat. (1888) § 891. Georgia: In all actions for money; Code (1895) § 4524. Illinois: In trespass and trespass on the case, as allowed on application; Hurd Stat. (1899) Ch. 11, § 31. Iowa: As allowed by the judge; Code (1897) § 3882. Kansas: For damages from crime or seduction committed in the state; Gen. Stat. (1897) Ch. 95, § 190. Minnesota: "In any action for the recovery of money" (Gen. Stat., 1894, § 5287) was held to extend to a tort action for negligent injury; Davidson v. Owens, 5 Minn. 69, Gil. 50. Mississippi: For penalty incurred by selling liquor contrary to law; Adams v. Johnson, 72 Miss. 896. Missouri: "In any civil action;" Rev. Stat. (1899) § 366; Pearson v. Gillett, 55 Mo. App. 312. Nevada: For injury from committing a crime within the state, extends to damages suffered by rape; Kuehn v. Paroni, 20 Nev. 203. New Mexico:

ments in certain cases to secure debts not yet due. These provisions extend only to absolute present debts payable at a future day. From what has been said it will be seen that the statutes generally extend the use of attachment and garnishment only to actions on contracts, judgments, and decrees. By interpretation, most courts have further limited the scope of the use of attachment, as distinguished from garnishment, by holding that the debt sued for must be: 1, liquidated or capable of being liquidated by some standard known to the law or specified in the contract;¹ and, 2, approximately ascertained when the action is commenced.² But a few courts hold that uncertainty in the amount of the demand is no objection to allowing the use of attachment.³

§ 111. AS TO THE GROUNDS OR EXIGENCIES. Some ground beyond the fact of an unpaid demand must exist to authorize an attachment under most statutes; but the statutes differ from each other considerably in enumerating what shall be sufficient grounds. Yet, all the grounds usually specified indicate, in one way or another, that the plaintiff would not be very likely to get satisfaction by prosecuting an ordinary action: 1, because the defendant is removing from the state, is now a non-resident, or is a foreign corporation, for which reason he could seldom or never be found within reach of a summons, and if served would not be likely to have property permanently

Comp. Laws (1897) § 2689. New York: For, "2, wrongful conversion of personal property; 3, any other injury to personal property, in consequence of negligence, fraud, or other wrongful act." Code Civ. Proc. § 635. North Carolina: For conversion of property; Clark's Code Civ. Proc. § 347. Ohio: "For the recovery of money," if defendant "9, fraudulently or criminally contracted the debt or incurred the obligation" (Bates's Stat., 1898, § 5521) was held to authorize attachment in an action for assault and battery; *Sturdevant v. Tuttle*, 22 Ohio St. 111; *Kirk v. Whittaker*, same, 115; *Creasser v. Young*, 31 Ohio St. 57. Oklahoma: For damages arising from felony or seduction committed within the territory; Gen. Stat. (1893) § 4068. Pennsylvania: In foreign attachment; Brightley's and P. Dig. (12th ed.), p. 930, § 6. South Carolina: For conversion of personal property; Code Civ. Proc. § 248.

¹Wilson v. Louis Cook Mfg. Co., cases 155, and see notes.

²Hawes v. Clements, cases 159.

³See notes to Wilson v. Louis Cook Mfg. Co., cases 158.

within reach of execution sufficient to satisfy the judgment; 2, because his character is such that it is reasonable to suppose he would defy execution by putting all of his property beyond reach before judgment could be recovered; which dishonest character is shown: *a*, by his having fraudulently incurred the obligation sued on; *b*, by his having absconded or concealed himself to avoid the service of process upon him; or, *c*, by his having assigned, concealed, or carried away his property, or a part of it, to get it beyond the reach of his creditors, or having threatened, prepared, or attempted to do so.

The rules to be deduced from the decisions upon these statutory provisions fall naturally into two groups: 1, those which show what constitutes removing, non-residence, fraudulently incurring the obligation, absconding, concealing, disposing of property to defraud, etc.; 2, those which apply alike to all the grounds for attachments. Several of the rules belonging to the first of these classes are considerably discussed in the cases given to illustrate the rules of the second class.⁴ But the matters coming within the first class are too numerous, minute, and local to be considered in so elementary a treatise as this.⁵

§ 112. RULES APPLICABLE TO ALL GROUNDS FOR ATTACHMENT. The principal rules applicable to all the grounds alike may be roughly formulated as follows:

1. An attachment obtained on one ground cannot be sustained on another, though the other would have been an equally good ground for issuing it.⁶

2. When an attachment is obtained on several grounds it is sustained by the existence of any of those grounds.⁷

⁴See cases pp. 163-177.

⁵For these decisions see: Attachment, §§ 54-121, Vol. 5, Century Digest 251-326; Attachment, 3 Am. & Eng. Ency. L. (2d ed.) 195-206.

⁶Matter of Fitzgerald, 2 Caines (N. Y.) 317; Botsford v. Simmons, 32 Mich. 357.

⁷Attachments, § 314, Century Digest, Vol. 5.

3. When an attachment is obtained on several grounds, and one of those grounds exists only as to part of the demands sued on, and the other grounds alleged exist only as to the remainder, the attachment will be sustained as to all.

4. When the alleged grounds for attachment exist only as to a part of the demand sued on, the whole attachment will usually be dismissed; but this would not be done if the improper item was included by mistake, nor because more was claimed than proved to be due, provided there was no fraud intended.⁹

5. When there are several defendants an attachment of the property of all cannot be sustained without an alleged ground for attachment existing as to all; but it seems unnecessary that the same ground should exist as to all. For example, the attachment might be sustained, as to one on the ground that he was a non-resident, as to the others on the ground that they had absconded.¹

6. The fact that a ground for attachment exists as to one and not as to the others, will not enable the creditor to sue him alone unless the obligation is joint and several. But, according to the decisions in several courts, the property of that one may be attached in a suit against all.¹

7. Whatever be the ground for the attachment it must be substantially made out. While the courts are inclined at the present time to construe the attachment statutes liberally to advance the remedy, they will not stretch the words of the statute to include cases which the legislature did not intend to include.²

⁹Meyer v. Evans, cases 166, and see notes; Emerson v. Detroit S. & S. Co., cases 168.

¹Wiley v. Sledge, cases 163-166, and see the notes.

²Jackson v. Burke, cases 170.

AT WHAT STAGE OF THE CASE THE PROCESSES MAY BE ISSUED.

Garnishments.

§ 113. Garnishments need not be separately considered; for where they are issued as attachments or ancillary to attachments they may be issued as early and as late as other attachments, and when they are issued as executions or ancillary to executions they may be issued as early and as late as other executions.

Attachments.

§ 114. Attachments are usually allowed by the statutes to be issued at the commencement of the action or at any time before judgment. For this purpose the action is commenced as soon as the declaration, or complaint, is filed and before the summons has been served or issued.³ After judgment there is no occasion for issuing an attachment, because every object it could serve would be as well served by issuing and levying an execution; but if an attachment should be issued after judgment it would be sustained as a special execution, provided it contained the essentials of an execution.⁴ In the absence of statute providing for reviving attachments and garnishments upon death of the defendant, they are abated by his death before judgment, but not by his death after judgment.⁵

Executions.

§ 115. BEFORE RECORDING OR WHILE STAYED. Executions issued before judgment is rendered are void, not voidable; and judgment subsequently rendered will not make them valid. Some statutes say, that as soon as the judgment is recorded, execution may issue; and several courts have held

³Hargan v. Burch, cases 177.

⁴Pracht v. Pister, cases 179.

⁵Drake on Attachment § 422; Rood on Garnishment § 381.

that executions issued under such statutes before the record is made are absolutely void,⁶ unless the court orders the entry made *nunc pro tunc*; but, according to other decisions, they are only voidable, and generally the plaintiff is entitled to execution as soon as he is entitled to payment, which is the moment the judgment is rendered. Reasoning by analogy from the decisions on kindred questions, the better rule would seem to be that executions issued after judgment rendered, but before recording it, contrary to statute, are only voidable, liable to be quashed on motion. For example, there is almost no dispute but that an execution is merely irregular, and not void, by reason of being issued while execution is stayed by statute, agreement of the parties, or order of court.⁴

§ 116. AFTER JUDGMENT BECOMES DORMANT. At the common law, execution should not issue more than a year and a day after the judgment was rendered, without first reviving the judgment by *scire facias*; and now, though the time is considerably extended by statute, it is usually provided that after the specified time execution shall not issue without special order of the court upon hearing after notice to the defendant. Yet an execution issued after the year and a day at the common law, or after the time specified in the statute, without *scire facias* or other appropriate proceeding, was never held to be void, but only liable to be set aside on the defendant's motion. He could not attack it collaterally, and no one else could object at all.⁸

§ 117. AFTER JUDGMENT OUTLAWED. An execution issued on a judgment which is outlawed, so that action could not be maintained on it, is generally held to be void, and the purchaser at the sale thereunder acquires no title.⁹ But when the execution was issued before the judgment outlawed, and

⁶Locke v. Hubbard, cases 9; Freeman on Executions § 24.

⁷Bacon v. Cropsey, cases 181; Abercrombie v. Chandler, cases 184; Freeman on Executions §§ 24-26, 33.

⁸Mariner v. Coon, cases 193.

⁹Freeman on Executions § 27a.

the sale was advertised and made afterwards, the title of the purchaser was held to be good.¹

§ 118. AFTER JUDGMENT SATISFIED. There is some conflict in the decisions, but the decided weight of authority is to the effect that an execution issued after the judgment is satisfied, or even a sale after the judgment is satisfied on an execution issued before, passes no title, even though the satisfaction had not been entered on the record, and the purchaser paid full value without notice.²

§ 119. AFTER DEATH OF A PARTY. At the common law execution issued after the death of a sole plaintiff was irregular, unless he was only the nominal plaintiff, or the judgment had been sold during his life, or revived on *scire facias* after his death; and a few courts have held such executions void.³ But the judgment did not have to be revived because of the death of one of several plaintiffs;⁴ and even the death of a sole plaintiff after execution issued did not abate it.⁵ If the sole defendant dies before the lien attaches the execution is generally held to be too late, but the writ is not abated by his death after the lien attaches;⁶ and the death of one of several defendants is generally held not to prevent issuing executions against all afterward, and levying them upon the property of the survivors without first reviving the judgment.⁷

¹Lundeman v. Hirth, 96 Mich. 17, 35 Am. St. Rep. 588.

²Wood v. Colvin, 2 Hill (N. Y.) 566; Kennedy v. Duncklee, 67 Mass. (1 Gray) 65; Wills v. Chandler, cases 186; Bullard v. McArdle, 98 Cal. 355, 35 Am. St. Rep. 176, 33 Pac. 193.

³Freeman on Executions § 35.

⁴Freeman on Executions § 36.

⁵Clerk v. Withers, cases 191; Freeman on Executions § 37.

⁶Parsons v. Gill, cases 189; People v. Bradley, cases 189; Freeman on Executions § 36.

⁷Martin v. Branch Bank, 15 Ala. 594, 50 Am. Dec. 147; Freeman on Executions § 36.

4. EFFECT OF USE OF ONE PROCESS ON RIGHT TO ANOTHER.

§ 120. A creditor who has sued out any execution or attachment may omit to execute it, and, before it is returned or returnable, take out a *capias* (*ad respondendum vel ad satisfaciendum*) and arrest the defendant thereon. But after the property has been taken under the other writ he cannot have or use a *capias* till the other is completely executed and returned.⁸ There are many decisions and text-books in which this doctrine is stated in round terms as applying to all forms of writs. It was once said that a mere levy is a satisfaction. That doctrine was completely exploded by Judge Cowen in *Green v. Burke*,⁹ yet you often see the statement that a levy is, *prima facie*, a satisfaction, which is equally false.¹⁰ All that is meant by these expressions is that the creditor will not be permitted to harass the debtor after having levied on enough property to make his debt secure. Decisions are abundant in which defenses to attachments on the ground that they were issued and levied while other property was held under other attachments for the same debt, have been denied.¹ Again, there are plenty of decisions denying similar objections to levies under executions while property was held under other executions on the same judgment.² And it is admitted by all courts, that the issuing and use of several similar executions on the same judgment, at the same time, may and should be allowed by the court wherever the ends of justice require it. Though these were issued without special order by the court, the sales under them would probably not be held void, but only voidable. Yet there are some decisions holding sales absolutely void, when made

⁸Miller v. Parnell, cases 195; Primrose v. Gibson, cases 196.

⁹Cases 205.

¹⁰Spring v. Ayer, cases 197; Sutton v. Hasey, cases 198; Adams v. Smallwood, cases 199; Brice v. Carr, cases 201; Yazoo & M. Ry. Co. v. Fulton, cases 202.

¹¹5 Century Digest, Attachment § 52; Rood Garnishment §§ 185, 186.

²See Cases pp. 196-201.

after property had been seized under a previous writ, and released by plaintiff's orders without the consent of the defendant.³

5. WHO MAY DEMAND AND CONTROL THE PROCESSES.

Every Person Owning a Claim.

§ 121. It is only justice that all men should stand equal before the law. Every judgment creditor may have his judgment enforced by execution if the nature of the judgment warrants it.⁴ Anyone may employ attachment and garnishment to secure the payment of his claim unless excluded by the plain terms of the statute or by his own acts. The United States, any state, a corporation, or an assignee of the demand, may employ attachment or garnishment, though he and the defendant are both non-residents, and the non-residence of the defendant is the ground for the attachment.⁵

Only Persons Interested in the Claim.

§ 122. The owner of the demand, and he only, has a right to have it enforced, and to control the means of enforcement.⁶ If he is absolute owner he has the sole right to control. If there are several part owners the rights of all will be protected, respect being given to the wish of the majority. If one has a paramount lien without owning the legal title, that will be protected.⁷ Thus, when an execution on A's judgment against B was levied by the sheriff on B's judgment against C, which the statute allowed, and thereafter with notice of the levy, C paid B, and B entered satisfaction on his judgment record—

³For full discussion see *Green v. Burke*, cases 205, and notes.

⁴*Freeman on Executions* § 21.

⁵Attachment §§ 43-45, *Century Digest*; *Rood on Garnishment* § 12.

⁶*Daugherty v. Moon*, cases 222; *Stanley v. Nutter*, cases 186.

⁷*Andrews v. Morse*, cases 224.

this did not defeat A's lien, but the court set aside the satisfaction, and ordered execution to be issued on B's judgment, so that the sheriff could collect it to satisfy A's judgment.⁸ Officers of court have no lien on the judgment for the amount of their unpaid fees; and, therefore, the sheriff cannot proceed on the writ in his hands to collect his fees after the parties have settled,⁹ nor refuse to accept the plaintiff's bid at the sale because the plaintiff would not pay his fees. Those having this right to control will be protected by the court against its officers, the plaintiff of record, and all persons presuming to interfere.

Writs Issued on Others' Orders are Valid.

§ 123. Yet an execution issued in the name of the judgment creditor without his consent is not void. It will protect an officer acting without notice of the want of authority to issue it, and will pass title to the purchaser.¹

Remedies of Persons Injured.

§ 124. Nevertheless, the plaintiff may have the execution set aside even after sale to an innocent purchaser unless the full price bid has been paid.² If the clerk refuses to issue process on the owner's demand, or the sheriff refuses to obey his orders in executing it, he may sue for damages on the offending officer's official bond, move the court to amerce him till he obeys, and in many cases have mandamus to him from the higher courts.³

Form of Demand and Proof of Authority.

§ 125. The person thus entitled to control the processes may do so in person in opposition to his attorney of record, or

¹Henry v. Traynor, 42 Minn. 234, 44 N. W. 11.

²Wills v. Chandler, cases 186; Morgan v. People, cases 221.

³Sowles v. Harvey, cases 227; Clarkson v. White, cases 226.

⁴Lewis v. Phillips, 17 Ind. 108, 79 Am. Dec. 457.

⁵State v. Herod, cases 221; Steele v. Thomson, cases 218; High on Extraordinary Legal Remedies § 82.

he may act through an agent whether such agent is an attorney or not. No particular form of demand is necessary; and failure to give proof of authority to command is no excuse to the officer for not acting unless he demanded such proof; but officers have a right to demand reasonable proof of authority before obeying one assuming to control.⁴

6. AGAINST WHOM THE PROCESSES MAY BE ISSUED.

Parties Only.

§ 126. Execution can be issued only against the parties cast in the judgment; and attachment and garnishment can be directed only against the effects of the persons sued. The execution must conform to the judgment to be enforced. The insertion into it of the names of persons as defendants who are not such, would protect an innocent officer in seizing their property, but would not pass title to the purchaser, though the persons so named as defendants were equally liable with the real defendants for the payment of the debt represented by the judgment.⁵ For the same reason the garnishee cannot be charged for his liability to a stranger who is co-debtor with the defendant on the debt sued for,⁶ nor for what the garnishee owes to the plaintiff.⁷

All Defendants.

§ 127. Every party cast in judgment is liable to execution. It matters not who he may be. If judgment may be recovered it may be enforced. Likewise, the effects of every person sued may be taken by attachment and garnishment.

⁴Daugherty v. Moon, cases 222; Steele v. Thompson, cases 218.

⁵Hamner v. Ballantyne, cases 312; Keniston v. Little, cases 231.

⁶Allinson v. Chicago, B. & Q. Ry. Co., 76 Iowa 209, 40 N. W. 813; Cleveland v. Spencer (Tex. Civ. App.), 50 S. W. 405.

⁷Rood on Garnishment § 47.

This applies to persons under legal disability, infants, lunatics, spendthrifts, and married women.⁸

Any Person May be Garnishee.

§ 128. The statutes usually provide that the plaintiff may have "any person" summoned as garnishee. These terms are generally held to include natural persons, corporations, non-residents, infants, lunatics, married women, and the plaintiff himself.⁹ Several courts have denied the plaintiff's right to charge a defendant as garnishee, on the ground that he gains no advantage thereby; but there is an advantage where the same person is sued in one capacity and summoned as garnishee in another, and such garnishments have been sustained in several cases.¹ The statutes forbidding husband and wife to testify against each other embarrass attempts to charge one as the garnishee of the other.²

Limitations Upon the Right to Process.

§ 129. To the rules stated in the two preceding sections, a limitation arises from the fact that the administration of public business cannot be diverted from its proper channels nor interrupted to advance the interests of any individual, and one department of the state cannot command and require obedience of another except as authority to do so is given it by law. For this reason courts cannot audit and compel payment of claims against the state, nor enforce their judgments when the legislature requests them to audit such claims, nor require the other departments of the state to answer before them as garnishees. For the same reason, one court cannot interrupt the business of any other court by requiring its officers to answer as gar-

⁸Dillon v. Burnham, cases 228, and see notes.

⁹Wilder v. Eldridge, cases 229; Graighe v. Notnagle, cases 234.

¹Brown v. Wiley, 107 Ga. 85, 32 S. E. 905.

²Berles v. Adsit, 102 Mich. 495, 60 N. W. 967. But see Porter v. Wakefield, 146 Mass. 25, 14 N. E. 792; Thompson v. Silvers, 59 Iowa 670, 13 N. W. 854.

nishee for property held by them as such officers, nor by seizing the property in their possession. The same reason forbids the seizure of any property used by any governmental agency—city, county, town, or public board—in the performance of its public trust; and is generally held to prevent requiring such agencies to respond as garnishees for property in their possession belonging to the defendant or debts they may owe him. Public service corporations—transportation companies, water companies, etc.—are generally held to come within the reason of this limitation in so far that the property used by them in the performance of their public trust cannot be seized on execution against them, and where the performance of their public duties would be interrupted thereby they cannot be required to answer as garnishees in suits against other persons.³

7. WHAT COURTS AND OFFICERS MAY ISSUE THE PROCESSES.

Every Court May Enforce its Judgments.

§ 130. It would be idle to adjudicate if without power to enforce; therefore, authority to pronounce necessarily implies authority to execute.⁴ For example, a sale of land on an execution issued by a county court not expressly authorized to issue executions was sustained in the following language: "The act establishes a court of record, and in general terms confers upon it the powers and duties of a court of record. The power to issue executions is incident to such courts unless denied, and no such denial is found in the act."⁵ But a statute giving one court authority to issue a special process unknown to the common law does not impliedly authorize other courts to issue such processes.⁶

³For full discussion of these limitations see Cases pp. 238-266.

⁴*Kentzler v. Chicago, M. & St. P. Ry. Co.*, cases 353; *Griffith v. Etna Fire Ins. Co.*, 7 Md. 102; *Freeman on Executions* § 10.

⁵*Bailey v. Winn*, 101 Mo. 649, 659, 12 S. W. 1045.

⁶*Rood on Garnishment* § 223.

No Court Can Issue Process on Judgments of Other Courts.

§ 131. Only the court in which the action is pending or which rendered the judgment can issue process to enforce it, unless the original record has been removed to some other court, or there is some statutory provision authorizing some other court to issue process to enforce it. Except in these cases, executions, attachments, and garnishments, issued from any other court, would be void, and the sale thereunder would pass no title.⁷ Statutes providing that the filing of a transcript of a judgment of one court in the court of another county, or in another court in the same county, shall have the effect of creating a lien upon the defendant's property, or shall have some other effect, do not impliedly authorize the courts in which such transcripts are filed to issue executions thereon, and executions so issued are void.⁸ For the same reason, garnishments so issued would be void.⁹

When Process from Other Courts is Authorized.

§ 132. In cases of appeal, if the appeal has the effect of destroying the judgment appealed from, as is usually the case where appeal is taken from the judgment of a justice of the peace, no process can afterwards be issued on that judgment by any court, but the court above issues execution on its own judgment when rendered. In other cases the judgment is not generally nullified by the appeal, and the court below issues the execution to enforce its judgment when it is affirmed unless some statute gives the court above authority to do so, or unless the original record was sent up.¹ Where statutes provide that execution may issue from a court in which a transcript of the judgment of another has been filed, it is generally held that

⁷Clarke v. Miller, cases 267; Freeman on Executions §§ 10-15; Rood on Garnishment § 236.

⁸Bostwick v. Benedict, cases 271.

⁹Weimeister v. Singer, 44 Mich. 406, 6 N. W. 859.

¹Tidd Pr. *994-*995; Rockwell v. District Ct., 17 Colo. 118, 31 Am. St. Rep. 265, 29 Pac. 454.

the judgment does not become a judgment of the court where the transcript is filed except for the purposes specified in the statute. When the transcript is taken from a justice court, it is generally held that the justice who rendered the judgment thereby loses authority to enforce it, revive it, or do anything further concerning it;² and it seems to me that the same rule might well be applied where the transcript is taken from one superior court to another for the same purpose; but there are several decisions holding in such cases that after the transcript has been sent the court that rendered the judgment may set it aside, receive payment of it, issue another transcript to another county, or revive it on *scire facias*.³

Only by the Proper Officer.

§ 133. No process is valid unless issued by the officer authorized by law or by his direction; and in several cases process issued by the proper officer has been held absolutely void because he thoughtlessly added to his signature some title in place of the name of his office, as when the clerk of the court was also justice of the peace and added that title instead of clerk.⁴ These decisions seem to me clearly wrong, on the ground that it is no worse than if he had not signed at all, a matter we will presently consider.⁵ Officers are not usually allowed to act in their own cases; but it has been held that an attachment issued by a clerk in his own case, upon his presenting to himself his own affidavit for the same, was valid, because no one else could issue the writ, and the issuance of it was not

²Rahm v. Soper, cases 269.

³Nelson v. Guffey, 131 Pa. St. 273, 18 Atl. 1073; Brandt's Appeal, 16 Pa. St. 342; King v. Nimick, 34 Pa. St. 297; Mellon v. Guthrie, 51 Pa. St. 116.

⁴Perry v. Whipple, 38 Vt. 278; Anderson v. Johett, 14 La. An. 614. Again, on action to quiet title, a sale on execution was held void because the printed blank used by the deputy clerk and signed by him bore the signature of a former clerk, and he failed to change it by inserting the name of the present clerk. O'Donnell v. Merguire, 131 Cal. 527, 63 Pac. 847.

⁵See post §§ 142-144.

judicial but purely ministerial and without discretion." The writ is generally held good though issued by a deputy not authorized by law or not duly appointed.⁷

8. FORM AND ESSENTIALS OF THE PAPERS.

Attachment and Garnishment Affidavits.

§ 134. EFFECT OF AFFIDAVIT WANTING OR DEFECTIVE. Most of the statutes require an affidavit to certain matters to be filed before the attachment or garnishment shall be issued, and generally provide for the supplying of defects by amendment. If no affidavit is made, or only one so seriously defective that it cannot be amended, the attachment or garnishment must of course fall when directly attacked for that reason by the defendant or garnishee; and fully half of the courts have held that the want of a sufficient affidavit may be set up by the defendant or any other person to avoid the proceeding collaterally.⁸ In the first part of this text considerable attention is given to collateral attacks for irregularities such as these;⁹ and in the note below will be found a few of the cases holding attachment and garnishment proceedings not open to collateral attack for want of the statutory affidavit.¹

§ 135. WHAT IS A SUFFICIENT AFFIDAVIT. *By and Before Whom Sworn to.* If the statute does not provide by

⁶Evans v. Etheridge, 96 N. C. 42, 1 S. E. 633; Womack v. Stokes, 9 Tex. Civ. App. 592, 29 S. W. 1113; Laning v. Iron City Nat. Bank (Tex. App.) 36 S. W. 481; Vermont Ins. Co. v. Cummings, 11 Vt. 503; Blount v. Wells, 55 Ga. 282. Contra: Doolittle v. Clark, 47 Conn. 316.

⁷McMahan v. Colclough, 2 Ala. 68; Kyle v. Evans, 3 Ala. 481, 37 Am. Dec. 705; Brush v. Lee, 36 N. Y. 49; Gamble v. Trahen, 4 Miss. (3 How.) 32.

⁸Attachment §§ 344-350, Vol. 5, Century Digest; Drake on Attachment §§ 86-89.

⁹See ante §§ 34-45.

¹Cooper v. Reynolds, cases 15; Martin v. Hall, 70 Ala. 421; Boothe v. Estes, 16 Ark. 104; Shea v. Johnson, 101 Cal. 455, 35 Pac. 1023; Paul v. Smith, 82 Ky. 451; Scott v. Kirschbaum, 47 Neb. 331, 66 N. W. 443; Westcott v. Sharp, 50 N. J. L. (21 Vroom) 392, 13 Atl. 243; Skinner v. Moore, 2 Dev. & Bat. (N. Car.) 138; Ward v. Howard, 12 Ohio St. 160; Billings v. Russell, 23 Pa. St. 189, 62 Am. Dec. 330; Goodbar v. City Nat. Bank, 78 Tex. 461, 14 S. W. 851; Hall v. Hall, 12 W. Va. 1.

whom it shall be made, the affidavit can be made by any one acting for the creditor and possessing personal knowledge of the facts; but if the statute requires it to be made by one, the affidavit of another will not do.² So, too, the oath may be administered by any officer competent to administer oaths generally unless the statute otherwise provides.

§ 136. *When Sworn To.* It should be sworn to before the writ issues, and not so long before as to raise a presumption that the facts have since changed.³ One sworn to the day before was held bad in Michigan.⁴

§ 137. *Substance.* The averments should be so positive that perjury could be assigned on them, and disjunctive forms of statement avoided; but, with these limitations, it is always safest to follow the words of the statute rather than to choose phrases which seem equivalent to them; for the court may entertain a different opinion on that matter, and the statute is the sole requirement. The affidavit is not sufficient unless it shows every fact which the statute requires it to show; but, on the other hand, it is not defective because any other matter is not shown by it. For example, when the statute does not require these things it need not show that it is made in behalf of the plaintiff, that suit has been commenced, how much is due, that anything is due, that the garnishee is a corporation, etc.⁵

§ 138. *Accuracy and Certainty.* An allegation of one ground will not sustain an attachment or garnishment on another; an allegation of one debt will not sustain an attachment on another; one cannot be charged as garnishee on an affidavit alleging indebtedness by another, by him and others,

²Pool v. Webster, 3 Metc. (Ky.) 278; Mantz v. Hendley, 2 Hen. & M. (Va.) 308. Compare: Flake v. Day, 22 Ala. 132; Drake on Attachment §§ 93-94; Rood on Garnishment § 250.

³Attachment, 3 Ency. Pl. & Pr. 5; Drake on Attachment § 90a; Rood on Garnishment § 255.

⁴Wilson v. Arnold, 5 Mich. 98. One day intervening is now allowed by statute. Horton v. Monroe. 98 Mich. 195.

⁵Drake on Attachment §§ 93b, 94a; Rood on Garnishment § 252; Burnham v. Doolittle, cases 273; Freer v. Hamilton (Mich.), 86 N. W. 824.

or by him alone in another capacity. The affidavit must be sufficiently specific and accurate on these matters to identify the persons, obligations, etc.; but the same affidavit, containing all essential averments, will sustain an attachment and garnishment, or several garnishments.⁶

§ 139. *Form.* The affidavit should be entitled in the court, and if made in a pending cause entitled in the cause, signed by the affiant, signed by the officer administering the oath, and dated. But errors in any of these respects are not generally held to be fatal if the essential facts appear from the paper as a whole or are otherwise shown.⁷

JUSTICE COURT GARNISHMENT AFFIDAVIT IN MICHIGAN.

State of Michigan, County of Washtenaw, ss.

John Smith, agent for William Smith, being duly sworn, says that John Brown and William Brown are justly indebted to said John Smith upon express and implied contract in the sum of ninety-four dollars, or thereabouts, and that for the recovery of said demand said John Smith has commenced suit before John Barnes, one of the justices of the peace in and for said county.

And this deponent further says, that he has good reason to believe and does believe, that the Michigan Central Railroad Company, a corporation under the laws of Michigan, is indebted to said John Brown and William Brown, and to each of them, and has property, money, and effects in its possession belonging to said John Brown and William Brown, and to each of them.

JOHN SMITH.

Subscribed and sworn to before me
this 11th day of October, A. D. 1901.

JOHN BARNES, Justice of the Peace.

AFFIDAVIT FOR ATTACHMENT IN ILLINOIS CIRCUIT COURT.

State of Illinois, County of Cook, ss.

John Smith, being duly sworn, says that John Brown and William Brown are justly indebted to William Smith in a sum exceeding twenty dollars, to wit, the sum of two hundred and twenty-five dollars, after allowing all just credits and set-offs; and that the said indebtedness is due for goods sold and delivered. And this deponent further says, that said John Brown and William Brown are not residents of this state, and that upon diligent inquiry affiant has not been able to ascertain the place of residence of them or either of them.

JOHN SMITH.

Subscribed and sworn to before me
this 14th day of October, A. D. 1901.

JULIUS REITZ, Notary Public.

⁶Drake on Attachment §§ 36, 104; Rood on Garnishment §§ 247-249.

⁷Burnham v. Doolittle, cases 273; Stout v. Folger, cases 275; Attachment, 3 Ency. Pl. & Pr. 12-14; Attachment §§ 231-237, Century Digest, Vol. 5; Drake on Attachment § 92.

Attachment Bonds.

§ 140. That the creditor shall file a bond before the writ issues is another requirement contained in most attachment statutes. This requirement is not usual in garnishment statutes, probably because garnishments do not interfere with the possession nor interrupt the use of the property as attachments do. The decisions upon the effect in collateral attack of the failure to give a bond when required, or such a one as is required, are as much in conflict as the decisions upon the kindred questions of affidavits wanting or defective, and the reasons in both cases are the same.* But the courts are agreed that failure to file a bond at the time, in the amount and terms, and executed by the persons required by the statute, is fatal on a direct attack by the debtor unless the statute has provided a means of curing the defect. Even a deposit in court of the amount in money would not do.⁹

Form and Essentials of Processes.

§ 141. PARTS OF PROCESS. The parts of judicial processes—original, mesne, and final—are: 1, the venue (State of Michigan, Washtenaw county, ss.), which shows where the subject-matter and proceeding is located; 2, the title as to the court (In the circuit court for Washtenaw county), which shows what court is conducting the proceedings; 3, the title as to the cause, if issued in a cause already commenced (Ella Glazier v. City of Ypsilanti), which shows in what cause the process is issued; 4, the style (In the name of the People of the State of Michigan), which shows what authority gives the commands contained in the process; 5, the address (To the sheriff of Washtenaw county, Greeting), which shows to

*In the following cases attachments were held not void collaterally for want of the required bond. *Thomas v. Mahone*, 72 Ky. (9 Bush) 111; *O'Farrell v. Stockman*, 19 Ohio St. 296; *Camberford v. Hall*, 3 McCord (S. C.) 345; *Billings v. Russell*, 23 Pa. St. 189, 62 Am. Dec. 330. See also: Attachment §§ 351-355, *Century Digest*, Vol. 5.

⁹Drake on Attachment § 115.

whom the commands contained in the process are given; 6, the body, which should contain an explicit statement of what is commanded to be done, when it is to be done, and how; 7, the teste (Witness the Hon. E. D. Kinne, circuit judge, at the city of Ann Arbor, Washtenaw county, this 23d day of December, A.D. 1901), which once indicated the final approval of the process by the sovereign or his proper officer together with the time and place when and where that approval was given; 8, the clerk's signature at the end (Jacob F. Schuh, clerk of said court, by John Clark, deputy); 9, the seal of the court if it has a seal, impressed upon the process at the left of the clerk's signature, to prove that the process is genuine; and, 10, indorsements such as are required by the statutes and court rules (e. g., A. J. Sawyer & Son, Ann Arbor, Mich., attorneys for plaintiff).¹

§ 142. WHAT FORMAL PARTS ARE ESSENTIAL. The venue and titles are usually omitted from many kinds of process, and probably the practice is not uniform as to giving or omitting them on any particular kind. Such matters can usually be settled in any state without much difficulty in any case by consulting the forms used there. But a question of more serious character, and much harder to answer, is this: What is the effect of an omission of any part required by inveterate practice, the court rules, the statutes, or the constitution? The difficulty in answering this question consists in the fact that no distinction, as to the importance of the various required parts, or between the various kinds of processes, is agreed to; except that processes issued before judgment have to be passed upon by the court, and their validity or invalidity is made *res judicata* by the judgment if the court had acquired jurisdiction. Almost any sort of proposition concerning almost any part of

¹Discussions and numerous decisions on these parts will be found in the following: Freeman on Executions §§ 38-46; Summons and Process, 20 Ency. Pl. & Pr. 1114-1177; Execution §§ 174-190, Century Digest, Vol. 21; Attachment §§ 403-410, Century Digest, Vol. 5; Rood on Garnishment § 258.

any process can be sustained by respectable authority, and refuted by authority equally respectable.

§ 143. SAME. Some may lightly answer that that is a small matter, depending upon the local practice. But is it a matter of practice merely? In direct attacks it may be conceded that substantial departures from prescribed form would be enough to avoid the proceedings. But how about collateral attacks? For example, when we come to look at the decisions, we find execution sales held void on collateral attack, because the writ was not sealed, as required; and the next minute we find a decision holding that the omission is not even ground for quashing the writ on direct attack.² Similar illustrations might be given of almost any other part. One judge says, if you omit this part, you may omit that; if you may omit two parts, you may omit ten. And what is there left? Where will you draw the line if not on the one side or on the other? He puzzles us, and we cannot answer him. Another judge compares the process to a man, and asks if cutting off a foot would deprive a descendant of Adam of his title to manhood. How much may be cut away and the man still live? Delighted with this judge's wit and his evident love of justice, we willingly follow him anywhere, perhaps too far.

§ 144. SAME. In a recent treatise on this subject, the writer takes up separately the various parts of the process, except the body; and, after citing and commenting on several decisions on both sides as to that particular part, concludes in each case that the process should not be held void, but voidable at most, for want of that part. However, this writer does not bother himself to answer the question above suggested, as to whether a writ would be valid which contained none of these parts but the body.³ Probably the majority of the decisions upon each of these points agree with the conclusions reached

²Sidwell v. Schumacher, cases 278; Lowe v. Morris, cases 281.

³See Alderson on Judicial Writs §§ 14-42.

by this writer. They more nearly accomplish the ends of justice, and seem to be correct, on the principle that the law favors substance rather than form, and will not deny substantial rights because of the misprison of a public officer.

§ 145. THE BODY OF THE PROCESS. *As a Summons.* Attachment and garnishment writs serve two objects, or consist of two parts, the command to summon and the command to attach; but executions need usually contain no summons. The summons should accurately specify who is to be summoned, and when and where he is to appear; but mistakes in the name, or omissions of it, may be cured by amendment whenever the mistake is discovered or objection made, and will not justify the party served in disregarding it.⁴ Statements of a past time or an improper time or place, and failure to state any time or place at all, are cured by appearance at the proper time and place without making objection; but will often cause the writ to be abated on proper objection at the first opportunity. The risk of its being held valid is too great ever to justify disregarding it. The writ may be bad as a summons and yet good as an attachment.

§ 146. *As an Attachment—Naming the Parties.* The rules as to the essentials of the body of the execution are the same as those governing the attachment and garnishment writs in so far as these are merely attachments. In all of these cases the writ should clearly state in what action or on what judgment it is issued, whose property is to be taken, what kind of property, how much, and when return of the writ is due. Mistakes in the names, omission of some, or additions of others, will not, according to most decisions, make the writ void; but the facts may be shown by extrinsic evidence.⁵ Such mistakes will not even justify the officer in failing to execute it,

⁴Attachment, 3 Ency. Pl. & Pr. 41; Attachment §§ 413-414, Century Digest, Vol. 5; Rood on Garnishment § 266.

⁵DeLoach v. Robbins, cases 293; Freeman on Execution § 43; Rood on Garnishment § 266.

or excuse the garnishee for paying over the property in his hands, provided the officer in the one case, and the garnishee in the other, really knew who was meant, whether he learned that from the writ or otherwise.⁶ For the sake of conforming to the judgment, the execution should issue in favor of all the plaintiffs and against all the defendants, although only one plaintiff is interested, and part of the defendants are dead, discharged in bankruptcy, or not liable for any other reason.

§ 147. *Same. What—How Much—When Return.* Direction to take realty first when the statute requires personalty to be first taken, is not generally held to make the writ void, but only erroneous. A failure to state how much is to be taken has been held to be a failure to command anything to be taken, justifying the officer in doing nothing, and giving him no authority to do anything. The writ is not void because it requires too much or too little to be taken, and the officer is not justified in disobeying it.⁷ A decisive majority of the courts hold that failure to state when the writ shall be returnable, or making it returnable at an improper time, do not make it void, nor excuse the officer in failing to execute it.⁸

EXECUTION FROM UNITED STATES CIRCUIT COURT FOR DISTRICT OF CALIFORNIA.

United States of America.

The President of the United States of America, to the Marshal of the District of California, Greeting: You are hereby commanded that of the goods and chattels of John Brown in your district, you cause to be made the sum of five thousand four hundred and twenty dollars to satisfy a judgment lately rendered in the Circuit Court of the United States for the District of California, against John Brown for the damages which John Smith has sustained, as well by reason of his damages as for the costs and charges in and about that suit expended, whereof the said John Brown stands convicted as appears of record. And if sufficient goods and chattels of the said John Brown cannot be found in your district, that then you cause the amount of said judgment to be made of the real estate, land, and tenements whereof the said John Brown was seized when said judgment was rendered, May 7th, 1901, or at any time afterwards, in whose hands soever the same may be. And have you that money, together with this writ, with your doings thereon, before the judges of the said Circuit Court, at the court-

⁶Freeman on Execution § 43; Rood on Garnishment § 267.

⁷DeLoach v. Robbins, cases 293; Bacon v. Cropsey, cases 181; Abercrombie v. Chandler, cases 184; Freeman on Execution § 42; Attachment, 3 Ency. Pl. & Pr. 44.

⁸Cases pp. 288-293; Freeman on Execution § 44.

house thereof, in the city and county of San Francisco and District of California, on the 18th day of December, A. D. 1901, to satisfy the judgment so rendered as aforesaid.

Witness, the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 10th day of October, A. D. 1901, and of our independence 125.

Attest my hand and the seal of said court, the day and year last above written.

WILLIAM MOORE, Clerk.

[Seal]

by Joseph Frey, Deputy Clerk.

JUSTICE COURT GARNISHMENT SUMMONS IN MICHIGAN.

State of Michigan, County of Washtenaw, ss.

To any constable of said county, greeting: In the name of the People of the State of Michigan, you are hereby commanded to summon the Michigan Central Railroad Company to appear before me, at my office, in the city of Ann Arbor, in said county, on the 18th day of October, A. D. 1901, at nine o'clock in the forenoon, to answer, under oath, all questions put to it touching its indebtedness to John Brown and William Brown, or either of them, and the property, money, and effects of the said John Brown and William Brown in its possession or control according to the allegations contained in the affidavit of John Smith duly made and filed in this suit. Hereof fail not, and have you then and there this precept.

Given under my hand at the city of Ann Arbor, in said county, this 11th day of October, A. D. 1901.

JOHN BARNES, Justice of the Peace.

ATTACHMENT AND GARNISHMENT SUMMONS IN ILLINOIS CIRCUIT COURT.

The People of the State of Illinois, to the Sheriff of Cook County, Greeting:

Whereas John Smith, as attorney for William Smith, hath complained that John Brown and William Brown are justly indebted to said William Smith in the amount of \$225.00, and that the same is due for goods sold and delivered; and the said William Smith having given bonds and security according to law: We therefore command you that you attach so much of the estate, real and personal, of the said John Brown and William Brown to be found in your county, as shall be of value sufficient to satisfy the said debt and costs, according to the complaint, and such estate so attached in your hands to secure, or so to provide, that the same may be liable to further proceedings thereupon, according to law; and that you summon John Brown and William Brown to appear and answer the complaint of the said William Smith, at a court to be holden at the court-house in the city of Chicago, in the county of Cook, upon the 14th day of November next; and that you also summon the First National Bank of Chicago, and such other persons as you shall be requested by the said William Smith, as garnishees, to be and appear at the said court on the said 14th day of November next, then and there to answer to what may be objected against them. When and where you shall make known to the said court how you have executed this writ, and have you then and there this writ.

Witness: John Young, clerk of the said court, October 14th, A. D. 1901.

[Seal]

JOHN YOUNG, Clerk.

3. EXECUTION OF THE PROCESSES.

Plan of Treatment, § 148.

1. Legislature's Power to Change the Remedy, § 149.
2. Power of the Court and Judge to Control the Processes, § 150.
3. Officer's Rights and Liabilities, §§ 151-160.
 - His Right to Protection, §§ 151-154.
 - Property Rights of the Officer, § 155.
 - Liability of the Officer, §§ 156-160.
4. Where the Processes May be Executed, § 161.
5. When the Processes May be Executed, §§ 162-163.
 - How Early, § 162.
 - How Late, § 163.
6. Who May Execute the Processes, § 164.
- 7-8. What May Be Taken Under the Processes, §§ 165-180.
 - Plan of Treatment, § 165.
 - Comparative Scope of the Processes, § 166.
 - Matters Peculiar to Garnishment, §§ 167-170.
 - Matters Applicable to All Processes, §§ 171-180.
9. The Levy and Service, §§ 181-188.
 - Matters Under this Head Reviewed, § 181.
 - The Levy, §§ 182-186.
 - Attachment and Garnishment Summonses, § 187.
 - Notice of Attachment, Garnishment, and Execution, § 188.
10. Lien Under Judgments, Attachments, Garnishments, and Executions, §§ 189-195.
 - When the Right Begins, §§ 189-192.
 - Nature of the Lien or Right, §§ 193-195.
11. How Lien Lost After Levy, §§ 196-207.
 - By Order of Court in Proceedings to Try, §§ 196-201.
 - Matters which Abate the Lien, §§ 202-207.
12. Foreclosure of the Lien, §§ 208-212.
 - Of What it Consists, §§ 208-210.
 - Effect of Defects, § 211.
 - The Officer's Return, §§ 212.

Plan of Treatment.

§ 148. Having completed our survey of the questions that arise concerning the issuance of the processes to enforce judgments, we come now to consider the questions that arise concerning the execution of those processes. Among these we may mention: 1, the legislature's power to change the remedy;

2, the power of the court and judge to control the processes; 3, the officer's rights and liabilities in executing the processes; 4, where the processes may run and be executed; 5, when the processes may be executed; 6, who may execute the processes; 7, for what garnishees may be charged; 8, what may be taken under attachments and executions; 9, what constitutes a valid levy and service; 10, the nature of the lien acquired by attachments, garnishments, judgments, and executions; 11, how that lien may be lost or become subordinate; 12, how it may be foreclosed. This order of arrangement of the questions is somewhat arbitrary, as was my arrangement of the questions arising concerning the issuance of the process. It is not possible to fix any exact order of sequence. But this arrangement brings up the questions as nearly in the order in which they would arise in practice as any I can discover; and, for want of a better plan, we will now take up each of these matters separately in the order named.

1. THE LEGISLATURE'S POWER TO CHANGE THE REMEDY.

§ 149. This and the following topic have to do with both the issuing and the execution of the processes, and can be as well considered here as anywhere. The matter of procedure is entirely in the control of the legislature. It may make laws apply to pending proceedings, though the result be fatal to them. No vested right is acquired by reason of having commenced suit. No right to proceed in the particular form is acquired by reason of that form existing when the contract was made.¹ The legislature may take away the remedy entirely or modify it at will as to all future transactions; and remedies for torts may be modified and destroyed after the tort is committed and even after the claim has been reduced to judg-

¹Heineman v. Schloss, cases 305.

ment.² The state legislature cannot impair any remedy existing at the time the contract is made, so as to prevent its use for the enforcement of the judgment recovered on such contract, unless an equivalent is given. This is because the United States constitution forbids the states to pass any law impairing the obligation of contracts.³

2. THE POWER OF THE COURT AND JUDGE TO CONTROL THE PROCESSES.

§ 150. Every court has power, and is in duty bound, to recall its processes, set aside them and the proceedings of its officers under them, stay the proceedings, and otherwise control them, whenever such action is necessary to prevent abuse, oppression, or injustice. This power is entirely independent of statute; it exists from the necessity of the case. Notice to the party should be given, but is not jurisdictional. The determination may be made summarily without the intervention of the jury. Probably the powers of the judge during vacation are more restricted; but he certainly could stay all further action till the matter could be determined in open court, and for this purpose, may act of his own motion without giving any notice to the parties.⁴

3. OFFICER'S RIGHTS AND LIABILITIES.⁵

His Right to Protection.

§ 151. HIS THREE SAFEGUARDS. An officer has three means of protecting himself from liability for acts done in

²Freeland v. Williams, 131 U. S. 405.

³Edwards v. Kearzey, cases 299.

⁴Commonwealth v. Magee, cases 307; Loomis v. Lane, 29 Pa. St. 242, 72 Am. Dec. 625; Sandburg v. Papineau, 81 Ill. 446; Orient Ins. Co. v. Sloan, 70 Wis. 611, 36 N. W. 388; Hopton v. Swan, 50 Miss. 545.

⁵For extensive citations on the matters under this head see: Mechem on Public Officers; Addison on Torts, Ch. 10, Sec. 2; Alderson on Judicial Writs, Ch. 30.

obeying the commands contained in the process he is called upon to execute: 1, the shield of the process; 2, recourse to the party whose process he serves; 3, the fact that his possession is the court's possession. Of these in the order named.

§ 152. THE SHIELD OF THE PROCESS. The officer is protected by process not absolutely void, whether regular or irregular; and he cannot take advantage of irregularities, though appearing on its face, to excuse his failure to obey it.* Void process, never as a sword but always as a shield, protects the officer in executing it if it is fair on its face, unless he knows that it is void. Whether the court issuing it be of general or limited jurisdiction, he is not bound to look behind his writ.⁷ Indeed, there is considerable respectable authority and excellent reason for saying that he should not attempt to decide the truth of statements made to him concerning it, but may and should leave those matters to be determined by the court.⁸ Yet he is not bound to execute any void process; and, if it is void on its face, he will not be protected in doing so. The court above may not agree with the court below as to its jurisdiction in the premises; but if the material facts appear, or are suggested, on the face of the process, the officer is bound at his peril, not merely to decide correctly all the questions of law presented, but to do what is impossible for other mortals—correctly forecast what will be the decision of the court of last resort upon them. If he refuses to proceed and the court finally holds the process valid he is liable to the plaintiff. If he acts as commanded by the process, and the court finally holds it void, even on the ground that the law under which it issued is unconstitutional, he is liable to the defendant.⁹ It

**People v. Dunning*, cases 286; *Milburn v. State*, cases 289; *Cooley on Torts* *460.

⁷*Keniston v. Little*, cases 231; *Savacool v. Boughton*, 5 Wend. (N. Y.) 170.

⁸*Webber v. Gay*, 24 Wend. (N. Y.) 485; *Bird v. Perkins*, 33 Mich. 28; *Hamner v. Ballantyne*, cases 312; *Abercrombie v. Chandler*, cases 184; *Freeman on Executions* § 102; *Cooley on Torts* *467; *Alderson on Writs* § 170.

⁹*Mechem on Public Officers* § 772; *Alderson on Judicial Writs* § 168.

has been said that in this particular the law says to the officer, "You are condemned if you do, and you are damned if you don't." His only safeguard is to demand indemnity in advance. If the process is fair on its face, and commands the officer to take any specific thing, he is protected in doing it, no matter who owns it.¹ But he is not justified in taking the property of one person, on a writ commanding him to take the property of another; nor in taking exempt property on a writ commanding him to take what is not exempt.² These matters he must decide. If the process protects him at all it shields him from liability for taking the person or property as commanded, and for breaking doors and going upon the property of the defendant or others when necessary to execute the command of the writ, except that he cannot break the outer door of the defendant's dwelling.³

§ 153. RECOURSE TO THE PARTY WHOSE WRIT IS SERVED. The officer may protect himself against loss of his fees, by insisting on receiving his pay in advance; but accepting the process without claiming the right waives it.⁴ Against liability for acting under a writ which may turn out to be void,⁵ or for taking property which may not be subject to the process, he may protect himself by refusing to act till a bond of indemnity is given him; and even after a levy without indemnity, if the creditor refuses or neglects on demand to indemnify him against new claimants, he is justified in yielding to them, or to a junior creditor who does indemnify.⁶ But failure to execute cannot be defended on the ground that indemnity was not given if none was demanded, nor because the indemnity given was worthless if he accepted it as sufficient.⁷ Without any indemnity being given or promised, the officer has recourse to

¹Buck v. Colbath, 3 Wall. 334; Thompson v. State, 3 Ind. App. 371.

²Lammon v. Feusier, cases 323; Watson on Sheriffs *204.

³Burton v. Wilkinson, cases 316; Bailey v. Wright, cases 427.

⁴Alexander v. State, 42 Ark. 41; Carlisle v. Soule, 44 Vt. 265.

⁵Grace v. Mitchell, 31 Wis. 533; Alderson on Judicial Writs § 180.

⁶Smith v. Osgood, cases 318; Mechem on Public Officers § 748.

⁷Mechem on Public Officers § 749.

the creditor for reimbursement for all loss suffered by him by reason of taking property which the creditor expressly directed him to take unless the officer was certain that the property was not liable to the process; in which case even an express promise to indemnify would be void. A general direction to execute the process does not make the creditor liable for the trespasses of the officer in executing it, nor to indemnify the officer against liability therefor.⁸ Contracts to indemnify from liability for disobeying process are usually held to be void. But an action on such a bond was sustained in a recent case, in which attorneys advised the sheriff that the process was void, and the defendant induced him to accept the bond and wait so that the validity of the process could be tried.⁸¹

§ 154. THE FACT THAT HIS POSSESSION IS THE COURT'S. Whatever protection the officer receives from this fact is merely incidental to the protection of the court's jurisdiction. Property seized under process thereby passes into the custody of the court issuing the process, and can be taken from the officer only on another process commanding it and issuing from the same court. Though the owner is a stranger to the process he cannot recover it in any other way. Nevertheless, this fact does not prevent him from recovering the value of the property in an action against the officer in any court otherwise competent to entertain the suit.^v

Property Rights of the Officer.

§ 155. Unless some statute otherwise provides, delivery of process to an officer to be executed does not, before levy, vest in him any title to or interest in any property which the process enables or directs him to take. His right and inten-

⁸Nelson v. Cook, cases 321; Ranlett v. Blodgett, 17 N. H. 298, 43 Am. Dec. 603; Cooley on Torts *468.

⁸¹Ray v. McDevitt (Mich.), 85 N. W. 1086. In this case the two affirmative opinions and the dissenting opinion of Hooker, J., review the decisions at considerable length.

^vLammon v. Feusier, cases 323.

tion to levy upon it give him no right of action against anyone who injures, destroys, or carries it away, even if done for the purpose of preventing a levy. The extent of his right is to seize it if he can get to it.¹ But a levy gives him such a special interest in the chattels taken as to enable him to retake them in another state;² or he may maintain replevin, case, trover, or trespass, as the facts and his interests may require, in his own name without adding his office,³ against his keeper if he fails to produce them on demand,⁴ against anyone who injures or takes them from him or his keeper,⁵ though he be a constable, and the taker a sheriff acting under a valid process.⁶ If the officer making the levy was a deputy he may sue in his own name,⁷ and the sheriff may also sue.⁸ Since the garnishee becomes a *quasi* officer by virtue of the garnishment, he has similar rights against anyone who interferes with his possession or injures the property.⁹ A process fair on its face is not sufficient to sustain an action. The plaintiff must show a valid process and levy.¹⁰

Liability of the Officer.

§ 156. IN GENERAL. The officer is liable for his own wrongs and for those of his deputies acting within the scope of their authority or in color of it. He is not liable for failure of himself or his deputy to do that which he could not have done by the exercise of due care and diligence, or which the

¹Mulheisen v. Lane, 82 Ill. 117; Hotchkiss v. McVickar, 12 Johns. (N. Y.) 403; Hathaway v. Howell, 54 N. Y. 97.

²Utley v. Smith, 7 Vt. 154; Rhoads v. Woods, 41 Barb. 471.

³Brewster v. Vale, 20 N. J. L. (Spencer) 56; Williams v. Herndon, 12 B. Mon. (Ky.) 484.

⁴Phelps v. Gilchrist, 30 N. Ham. (10 Foster) 171; Dezell v. Odell, 3 Hill (N. Y.) 215.

⁵Freeman on Executions § 268, Drake on Attachment § 297.

⁶Robinson v. Ensign, 72 Mass. (6 Gray) 300; Maguire v. Bolen, 94 Wis. 48.

⁷West v. Thompson, 27 Vt. 613; Robinson v. Ensign, 72 Mass. (6 Gray) 300.

⁸Smith v. Wadleigh, 18 Me. 95.

⁹Erskine v. Staley, cases 458, and notes.

¹⁰Hamner v. Ballantyne, cases 312; Drake on Attachment § 185a.

law did not authorize him to do or left in his discretion to do or not. But for malfeasance and misfeasance he is not excused by the fact that he acted in good faith, was only a *de facto* officer, or was liable to a statutory penalty for the same act.¹ For the wrong of the officer or his deputy, the person injured may sue the officer on his official bond, may sue him alone, or, for the deputy's misfeasance or malfeasance, may sue him alone; but for nonfeasance the deputy is liable only to his superior.² The officer who commences executing a process must finish it though his term of office expire in the meantime; therefore, if an officer is re-elected, and during his second term becomes liable for the act or default of himself or deputy under a process received and partly executed during his first term, his bond for his first term is liable, and his bond for his second term is not.³ Only a person showing a direct duty to himself violated and a special injury proximately resulting therefrom can recover, and then only to the amount of the injury suffered.⁴ The officer is never liable for an injury resulting from doing what the party complaining or his representative ordered or requested him to do.⁵

The persons to whom liability may thus be incurred are: 1, the plaintiffs in the process; 2, the defendants in the process; 3, strangers to the process. Of these in the order named.

§ 157. TO THE PLAINTIFF IN THE PROCESS. *Instances of Liability.* 1. If process not absolutely void is presented to the officer to be executed, and he refuses or neglects to execute it during the time allowed by law therefor, the plaintiff may recover against him unless he shows a legal excuse for his default.* 2. So, if he disobeys any legal instructions of the

¹Mechem on Public Officers §§ 666-671, 798.

²Mechem on Public Officers §§ 678, 798.

³Colyer v. Higgins, cases 346.

⁴State v. Harris, 89 Ind. 363, 46 Am. Rep. 169; Cooley on Torts, 394; Mechem on Public Officers § 674.

⁵Fisher v. Magnay, 5 Man. & Gr. 778; State v. Boyd, 63 Ind. 428; State v. Yongue, 9 Rich. (S. Car.) 443.

*Addison on Torts, Ch. 14, Sec. 2; Mechem on Public Officers § 758.

plaintiff in executing, whereby he fails to take the property, incurs expense, fails to realize as much at the sale as otherwise might have been obtained, etc.⁷ 3. So, if he is not reasonably diligent in searching for property⁸ or in levying upon it, by reason of which the process cannot be so effectively executed; for example, if the defendant has died in the meantime, sold the property, encumbered it, or suffered a levy by another.⁹ 4. So, if he does not take enough when enough could have been found by the exercise of reasonable diligence.¹ 5. So, if he allows the defendant to escape after arrest on a *capias* unless caused by the act of God or the public enemy.² 6. So, if he suffers a loss of or injury to the property attached which reasonable diligence could have prevented; and in the case of property taken under execution several courts have held that he would be excused by nothing short of the act of God, public enemy, or inevitable accident.³ 7. So, if he accepts an insufficient delivery bond from the opposite party, a claimant, or other person, where the statute allows the recovery of the property on giving bond.⁴ 8. So, if he does not follow the law as to the manner of advertising and selling,⁴ or does not use due diligence to realize the best price.⁵ 9. So, if he makes a false return.⁶ 10. So, if he does not make return by the return day, though not specially rule¹ to do so.¹⁰ These are the cases in which liability is most frequently incurred; but he may become liable in other cases.

⁷State v. Herod, cases 221; Morgan v. People, cases 221; Alderson on Judicial Writs § 181.

⁸Alderson on Writs § 174; Mechem on Public Officers § 754.

⁹Knox v. Webster, cases 328; Russell v. Lawton, cases 330; Albrecht v. Long, cases 333; Commonwealth v. Magee, cases 307.

¹Alderson on Judicial Writs § 182; Mechem on Public Officers § 755.

²Hartleib v. McLane, cases 348.

³Mechem on Public Officers § 762; Noble v. Desmond, 72 Cal. 330.

⁴Sexton v. Nevers, 20 Pick. (Mass.) 451, 32 Am. Dec. 225; Johnson v. Reese, 28 Ga. 353, 73 Am. Dec. 757; Sheehy v. Graves, 58 Cal. 449.

⁵Todd v. Hoagland, 36 N. J. L. 352.

⁶Acton v. Knowles, cases 464; Mechem on Public Officers § 764; Watson on Sheriffs *203.

¹⁰Burk v. Campbell, cases 343; McGregor v. Brown, cases 342.

§ 158. *Measure of Liability—Defenses.* The measure of the officer's liability in any of these cases is the amount that could have been realized by proper care and diligence, and it is no defense that any part or the whole can still be realized.⁸ The burden is on the officer to show that part or all and how much could not have been recovered. It is presumed that all might have been recovered. It is a good defense that the property pointed out was exempt or belonged to another.⁹ It is no defense that all the property pointed out by the plaintiff was levied on under his process, and that the remainder could not be found by the sheriff till pointed out by the junior creditor on whose writ it was sold.¹ It is no defense that the deputy disobeyed the terms of his commission or the officer's orders.² It is no defense that the officer omitted the levy or released the property in deference to a senior process in the hands of another officer.³

§ 159. TO THE DEFENDANTS IN THE PROCESS. An officer holding and executing valid process will become liable to an action by the defendants therein: 1, if the officer arrests or seizes beyond his territory;⁴ 2, on Sunday, after the return day,⁴ or, 3, contrary to the exemption laws;⁵ 4, if he breaks the outer door of the defendant's dwelling, or injures any other property by breaking into anything without demanding admission;⁶ 5, if he takes property from the defendant's person, for example, a watch or money in his pockets, or a pin on his tie, but not, it was held, for taking it out of his hand;⁷ 6, if he perpetrates a fraud to accomplish a levy, as by decoying the

⁸Ledyard v. Jones, cases 344. But see Townsend v. Libbey, 70 Me. 162.

⁹Bonnell v. Bowman, 53 Ill. 460; Canada v. Southwick, 16 Pick. (Mass.) 556.

¹Knox v. Webster, cases 328.

²Boucher v. Wiseman, cases 332; Albrecht v. Long, cases 336.

³Payne v. Drewe, cases 338; Albrecht v. Long, cases 333.

⁴Watson on Sheriffs *204; Upton v. Craig, 57 Ill. 257; Vail v. Lewis, 4 Johns. (N. Y.) 450, 4 Am. Dec. 300.

⁵Mechem on Public Officers § 774.

⁶Burton v. Wilkinson, cases 316.

⁷Maxham v. Day, 82 Mass. 213; Green v. Palmer, 15 Cal. 411.

defendant into his territory, or arresting him on criminal process, or asking to see the watch in defendant's pocket and taking it when shown;¹⁰ 7, if he levies on other property after he has taken enough to satisfy the process beyond all question,¹¹ or arrests without searching for goods when there is plenty of property to satisfy his writ,¹ or takes realty when there is plenty of personalty which he should first take,² or takes and sacrifices very valuable property when enough other was offered that he could have sold without such sacrifice;³ 8, if he works or uses the property taken, or allows it to be lost or injured for want of due care;⁴ 9, or puts any unnecessary hardship on the defendant, by maltreating him while under arrest,⁵ or purposely making the levy in a violent, insulting, or oppressive way, for example, at night, or at the defendant's store during business hours with vexatious leisure so as to injure his business;⁶ 10, if he delivers up the property to a claimant or other person without taking a sufficient security;⁷ 11, if he proceeds after receiving official notice or notice from the plaintiff that the process has been paid, stayed, superseded, or enjoined, but mere statement by the defendant that he has paid is not enough;⁷ 12, if he does not follow the law as to advertising and selling or unnecessarily sacrifices the property at the sale or continues selling after enough has been realized;⁸ 13, if he buys directly or indirectly at the sale, was interested in or a party to the process, or was otherwise disqualified from acting;⁹ 14, if he

¹⁰Holker v. Hennessy, cases 413; Mack v. Parks, 74 Mass. (8 Gray) 517.

¹¹Freeman on Executions § 253; Mechem on Public Officers § 773.

¹Barhydt v. Valk, 12 Wend. (N. Y.) 145, 27 Am. Dec. 124.

²Freeman on Executions § 279.

³Rogers v. Brewster, 5 Johns. (N. Y.) 125.

⁴Cooley on Torts *462.

⁵Wood v. Graves, 144 Mass. 365, 59 Am. Rep. 95, 11 N. E. 567.

⁶McElhenny v. Wylie, 3 Strobb. (S. Car.) 284, 49 Am. Dec. 643; Barrett v. White, 3 N. H. 240, 14 Am. Dec. 353; Alderson on Writs § 179.

⁷Mechem on Public Officers §§ 762, 772.

⁸Hayes v. Buzzell, 60 Me. 205; Freeman v. Leonard, 99 N. C. 274; Carrier v. Esbaugh, 70 Pa. St. 239; Hall v. Ray, 40 Vt. 576, 94 Am. Dec. 440; Cooley on Torts *462.

⁹Singletary v. Carter, cases 364; McMillan v. Rowe, cases 360.

fails to account for the surplus in any case and for all if the writ is set aside while he holds the property or proceeds;¹ or, 15, if he had no process or it was void. There are many other cases in which the officer would become liable to the defendant in the process; but those above mentioned occur most frequently.

§ 160. TO STRANGERS TO THE PROCESS. The officer may become liable to strangers to the process by any unnecessary interference with their persons or property.² While the officer may enter the premises of strangers, or even break into their dwellings after demanding admission, to take the person or property of the defendant therein; he is liable to them if he attempts to store property on their premises, or stays longer than is necessary to get it away.³

4. WHERE THE PROCESSES MAY BE EXECUTED.

§ 161. Execution of process beyond the limits of the territory to which the jurisdiction of the court or the officer's jurisdiction to act extends, amounts to nothing, though the process be addressed to that territory. Where the statutes provide that a court of one county may issue its process to and have it executed in another county upon certain things being done, there is considerable dispute as to whether process issued and executed in the other county can be avoided collaterally, or only upon direct attack for failure to comply with the statute.*

¹Cooley on Torts *463.

²Lammon v. Feusier, cases 323; Mechem on Public Officers §§ 781-783.

³Williams v. Powell, 101 Mass. 467; Burton v. Wilkinson, cases 316; Drake on Attachment § 200.

⁴Kentzler v. Chicago, M. & St. P. Ry. Co., cases 353, and notes.

5. WHEN THE PROCESSES MAY BE EXECUTED.

How Early.

§ 162. If the officer presumes to execute the process before he receives it he is a mere trespasser. That he acted because he knew it had been made out and mailed to him, and that he afterwards received it and returned his action upon it, will not make the act valid nor excuse his trespass.⁵ But the moment he receives it with orders from the creditor to proceed he may execute it. The debtor can demand no indulgence of him.⁶ The attachment or garnishment writ may be executed before the summons to the defendant is served or issued.⁷

How Late.

§ 163. The diligence with which the officer must proceed to avoid liability has already been considered.⁸ The only remaining question under this head is the validity of delayed action. The attachment and garnishment statutes often require the defendant and garnishee to be served a certain number of days before the time for appearance mentioned in the process. In such cases service less than that many days before the appointed time will usually be held bad on direct attack, and has been held void on collateral attack.⁹ When the writ expires the officer's authority, except to complete acts begun, expires with it. A voluntary payment of money received by the officer from the debtor after the return day if no levy has been made, is not held by him in his official capacity. The creditor cannot compel him to account by summary process of attachment, nor by proceeding upon his bond, but only by

⁵Wales v. Clark, cases 362.

⁶Goode v. Miller, 78 Ky. 235, 237.

⁷Hargan v. Burch, cases 177; Bank of Mo. v. Matson, cases 290.

⁸See ante § 157.

⁹Southern Bank v. McDonald, 46 Mo. 31; Attachment § 666, Century Digest, Vol. 5; Rood on Garnishment § 268.

assumpsit or similar action.¹ A levy after the return day is generally held to be absolutely void, though another levy had been made in season under the same process. The officer is a trespasser, and the purchaser gets no title.² A levy after the officer has indorsed his return and filed the process is void though the return day has not yet arrived.³ But a mere indorsement of the return on the process does not prevent a subsequent levy before the return day,⁴ and a levy on the return day is good.⁵ If a levy is made in time the further proceedings (advertising, selling, disposing of the proceeds, and making return) may be had after the return day and after the writ has been returned, though no new authority has been issued, and the officer's term has meanwhile expired.⁶

6. WHO MAY EXECUTE THE PROCESSES.

§ 164. Process can be executed only by an officer duly authorized to execute such processes generally, or especially deputized to serve that particular process. Execution of a process by an unauthorized individual is void, and the possession of the process is no protection to him.⁷ Execution of process by a *de facto* officer is not void as to innocent parties, but the officer himself is not protected by the writ.⁸ Process can be executed only by an officer who has it in his possession, and is acting within the territory of his jurisdiction.⁹ Execu-

¹Hamilton v. Ward, 4 Tex. 356; Wyer v. Andrews, 13 Me. 168, 29 Am. Dec. 497; Bank v. Reid, 3 Ala. 299.

²McDonald v. Gronefeld, 45 Mo. 28; Sturges's Appeal, 86 Pa. St. 413; Commonwealth v. Magee, cases 307; Freeman on Executions § 106.

³Phillips v. Dana, 4 Ill. 551; Paine v. Hoskins, 71 Tenn. (3 Lea) 284.

⁴Courtney v. Carr, 6 Iowa 238; Nelson v. Cook, 19 Ill. 440.

⁵Evans v. Barnes, cases 468; Blaisdell v. Sheafe, 5 N. Ham. 201; Drake on Attachment § 187b.

⁶Evans v. Barnes, cases 468; Colyer v. Higgins, cases 346; Smith v. Osgood, cases 318; Acton v. Knowles, cases 464.

⁷McMillan v. Rowe, cases 360.

⁸Green v. Burke, cases 205.

⁹Wales v. Clark, cases 362; ante § 161.

tion of process by an officer interested in it or party to it,¹ or by one officer to whom it might be directed when it is directed to another,² has been held absolutely void on collateral attack; but it seems to me that these matters should only be held to make the act voidable at most, and such is the opinion of several courts and text-writers of recognized ability.³ While property is held by an officer under one process no other officer can take it. An officer who has levied upon property under one process may make a second levy under another process issuing from the same court,⁴ by simply indorsing it on the writ, though the actual possession is held by his receiver.⁵ Yet even he cannot take it under process from any other court without statute expressly authorizing such action; for he is merely the court's servant, and he cannot serve two masters whose orders may be inconsistent.⁶

7-8. WHAT MAY BE TAKEN UNDER THE PROCESSES.

Plan of Treatment.

§ 165. In treating of executing the processes I first considered the power of the legislature and courts to limit and control the use of the processes, matters which apply equally to the issuance and the execution of them. Then I looked forward, as a prudent officer should on receiving the process, to consider what rights and liabilities the officer may acquire in executing the process or in making default. Then I spoke very briefly of the place, time, and person, where, when, and by whom, the process might be executed. The next pertinent

¹Singletery v. Carter, cases 364.

²Gordon v. Camp, cases 296; Menderson v. Specker, cases 298; Bybee v. Ashby, reviewed in cases 280.

³Terrill v. Auchauer, 14 Ohio St. 80, ante §§ 39-43; Freeman on Executions § 40; Alderson on Judicial Writs §§ 25, 98.

⁴Hewe v. Moody, cases 365; Bailey v. Childs, 46 Ohio St. 557.

⁵Bell v. Shafer, 58 Wis. 223, 16 N. W. 628; Tomlinson v. Collins, 20 Conn. 364.

⁶Read v. Sprague, 34 Ala. 101; Burnham v. Dickson, 5 Okl. 112.

inquiry seems to me to be, What may be taken? This question must be answered before the levy can be made under an attachment or execution, and its answer in advance may avoid payment of costs on a fruitless garnishment. In view of some differences in the processes, I will first consider the comparative scope of the various processes, then some matters peculiar to garnishment, and finally the matters applicable alike to all processes.

Comparative Scope of Processes.

§ 166. Garnishment is not an appropriate process to arrest the person; nor is a *feri facias*, to take intangible things. Most, if not all, writs are similarly limited as to their scope; but the great body of rules in this connection apply alike to all processes. Wherever *capias* lies in attachment it lies in execution.⁷ Whatever property may be taken in execution may be attached.⁸ Whatever cannot be taken under execution cannot be attached.⁹ In scope, garnishment differs from these principally in the fact above mentioned, and the further fact that it is peculiarly adapted to impounding obligations to pay. Moreover, it is not usually desirable nor available against real property; but in a few states the garnishee may be charged for land in his possession.¹ Otherwise, almost any property liable to attachment or execution is liable to garnishment.

Matters Peculiar to Garnishment.

§ 167. TWO GROUNDS OF LIABILITY. The statutes contemplate two distinct classes of cases in which the garnishee may be charged: 1, when he has specific property in his possession belonging to the debtor, that is, when he is a bailee; 2, when he is indebted to the defendant.² Of these in their order: but first, as to when the liability begins.

⁷Harbert's Case, cases 137.

⁸Handy v. Dobbin, cases 424.

⁹Drake on Attachment § 244; Kneeland on Attachment § 310.

¹Webber v. Hayes, 117 Mich. 256, 75 N. W. 622.

²Allen v. Hall, cases 140; Botsford v. Simmons, 32 Mich. 357.

§ 168. FROM WHAT TIME RECKONED. The liability of the garnishee, whether as debtor or as bailee, depends upon the situation at the time fixed upon by the statute, which is usually the moment when the process is served on him. A very few statutes make it date from the time the officer receives the writ, and others allow his liability to be increased by anything occurring before he answers. The rule usually applicable is that no event subsequent to the date fixed upon can discharge him if he was liable then, make him liable if he was not liable then, nor increase or diminish the amount of his liability.³

§ 169. GARNISHEE AS BAILEE. The garnishee can be charged as bailee only for property liable to sale under execution, for when charged as such he discharges himself by delivering up the specific thing to the officer to be sold. It would be useless to charge a garnishee if the thing could not be made available when surrendered.⁴ But on the other hand, if the property is such that it could be sold under execution, that fact is pretty good evidence that the garnishee can be charged for it,⁵ unless it can be sold under execution only by virtue of some statute prescribing a specific procedure, in which case that procedure only can be followed.⁶ And a few statutes authorize garnishment only for property which cannot be levied on.⁷ The property for which the garnishee can be charged as bailee will be considered when we come to discuss the matters applicable to all processes. All that need be added under the present head is that the garnishee can be charged as bailee only for property actually within the control of himself or his bailee, independent of the control of the defendant.⁸

³Foster v. Singer, cases 387; Webber v. Bolte, cases 390; Lehmann v. Farwell, cases 392; Rood on Garnishment § 49.

⁴Rood on Garnishment § 393.

⁵Banning v. Sibley, 3 Minn. 389; Old S. N. B. v. Williams, 112 Mich. 564.

⁶Moor v. Walker, 46 Iowa 164; Packard v. Laev, 100 Wis. 644.

⁷Brown v. Davis, cases 370.

⁸First Nat. Bank v. Davenport &c. Ry. Co., cases 372; Gutterson v. Morse, cases 376; Avery v. Monroe, cases 378.

§ 170. GARNISHEE AS DEBTOR. The fact that a debt presently owing is not payable till a future day, or till after demand, or is secured by mortgage or otherwise, or could be sued for only by the defendant and others jointly, is generally no defense to the garnishment.⁹ The garnishee can be charged as debtor only when he is proceeded against as debtor¹, and only on an unconditional² liquidated obligation on contract or judgment,³ payable in money,⁴ not exempt under the statute from liability for debt,⁵ nor evidenced by any outstanding negotiable instrument,⁶ nor in suit or judgment in any other court.⁷ As a general rule any defense which the garnishee could set up in a suit against him by his creditor is equally available when his creditor's creditor seeks to charge him on the debt, and no other defenses are available.⁸

Matters Applicable to All Processes.

§ 171. GENERAL RULE. The policy of the law is to make the judgments of the courts effective, and for this purpose the processes now being discussed have been provided. In keeping with this policy, we would expect to find the courts willing that these processes should be used in any way that bids fair to accomplish that purpose without producing a greater evil than that for which the judgment was given. And such is the law. The use of a *capias* to make judgments effective has been restricted by statute, because the public has become convinced that its unrestricted use is more productive of evil than of good. If it be alleged that any property is not liable to executions, attachments, and garnishments, a good reason

⁹Moore v. Gilmore, cases 382; Rood on Garnishment §§ 46, 126, 127.

¹Botsford v. Simmons, 32 Mich. 357.

²Foster v. Singer, cases 387; Webber v. Bolte, cases 390.

³Lehmann v. Farwell, cases 392.

⁴Jones v. Crews, cases 394.

⁵Reynolds v. Haines, cases 400.

⁶Thompson v. Gainesville Nat. Bank, cases 395.

⁷Scott v. Rohman, cases 405.

⁸Allen v. Hall, cases 140; Rood on Garnishment § 46.

should be given to support the assertion. Therefore, in the discussion of this subject, we will start with the general rule that all property is liable to the processes, and will limit the statement by such exceptions as we find supported by sufficient reasons. The principal of these reasons are: 1, that the judgment or process is limited so as not to extend to the things proposed to be taken; 2, that they are not property; 3, that the defendant has not a sufficient estate in them; 4, that they are exempt. Of these in their order.

§ 172. THE JUDGMENT OR PROCESS LIMITED. All judgments and processes are limited as to persons, place, and property. As to persons, they are limited to the person against whom the judgment is rendered or the process issued. The property of strangers cannot be taken though they be equally liable with the defendant for the payment of the demand sued on.⁹ As to place, they are limited to the property within the jurisdiction.¹ In attachment proceedings without personal service or appearance, the judgment is limited to the property attached; but if the defendant has appeared generally, the execution may be both general and special.² When the judgment is general, the property of the defendant within the jurisdiction which can be taken is limited by the scope of the process, as above indicated.³ If the process be against several, the officer may take their joint property, or, at his option, levy the full amount of the property of any one, disregarding the debtor's wish as to selection, unless the process otherwise directs, or some statute secures these rights to defendants.⁴

§ 173. 2. THE THING NOT PROPERTY. Many things contribute to our enjoyment of life which the law does not look upon in the light of property at all.⁵ The general rule in this

⁹Hamner v. Ballantyne, cases 312; Freeman on Executions § 254.

¹Lindley v. O'Reilly, cases 65; Kentzler v. Chicago, &c. Ry. Co., cases 353.

²Pennoyer v. Neff, cases 48; Conn v. Caldwell, cases 425.

³Ante § 166.

⁴Freeman on Executions §§ 258, 259.

⁵See Coke Lit. p. 47, enumerating pets, etc.

connection is that nothing can be taken under process as property unless the thing may be sold. Thus, intoxicating liquors where prohibited,⁶ burglars' tools, dies to counterfeit the public currency, or any other thing, the sale, manufacture, and possession of which is unlawful, are not property nor liable to seizure to satisfy debts. Again, the right to sue for a tort is not property. It cannot be sold separate from the thing upon which the tort was committed, and the wrong-doer cannot be charged as garnishee by reason of his liability for it.⁷ Again, any franchise granted by the public to an individual,⁸ or license granted by one individual or corporation to another, as a seat on the stock exchange,⁹ are not property, but personal privileges. In the same connection, may be mentioned, the right of an author to publish his manuscript or to withhold it,¹ and the monopoly of authors and inventors secured to them by the patent and copyright laws.² All of these have been held not liable to any legal process to enforce judgments; sometimes, on the ground that they are not property, and sometimes on other grounds. But in most of these cases, and it may extend to all yet, the courts have held that the advantages of these privileges may be made available for the satisfaction of judgments, by invoking the extraordinary jurisdiction of the equity courts.³ Again, notes, bonds, judgment records, title-deeds, and other evidences of title or indebtedness are not property in such a sense that they are liable to seizure and sale on any process to enforce judgments, unless there be a statute making the seizure of the written evidence equivalent to the seizure of the things evidenced.⁴

⁶*Kiff v. Old Colony, &c. Ry. Co.*, 117 Mass. 591, 19 Am. Rep. 429; *Nichols v. Valentine*, 36 Me. 322; *Barron v. Arnold*, 16 R. I. 22. But see: *Howe v. Stewart*, 40 Vt. 145; *Tucker v. Adams*, 63 N. Hamp. 361; *Fears v. State*, 102 Ga. 274.

⁷*Lehmann v. Farwell*, cases 392.

⁸*Gue v. Tide-Water C. C.*, 65 U. S. (24 How.) 257.

⁹*Lowenberg v. Greenebaum*, 99 Cal. 162, 33 Pac. 794.

¹*Dart v. Woodhouse*, 40 Mich. 399, 29 Am. Rep. 544.

²*Stevens v. Gladding*, 58 U. S. (17 How.) 447.

³*Ager v. Murray*, 105 U. S. 126.

⁴*Freeman on Executions* § 112; *Drake on Attachment* § 244d; *Kneeland on Attachment* § 323; *Rood on Garnishment* §§ 163-168.

§ 174. 3. DEFENDANT'S ESTATE INSUFFICIENT. A thing which is property may not be liable to the process, because the defendant has not a sufficient estate in it. At common law, nothing could be taken in which the defendant's estate was merely equitable, because the law courts did not recognize a merely equitable title, and the equity courts enforced their decrees by coercion. But statutes have been passed in most of the states making such estates liable; and the codes which have abolished the distinctions between law and equity have largely contributed to the same effect.⁵ Property in which the defendant has a vested legal estate is often held not liable, because other persons have estates in the same property which might be prejudiced by a seizure and sale. Under this head, may be mentioned, future estates in chattels, which could be seized only by ousting the particular tenant;⁶ property in which the defendant has only an undivided interest as joint tenant, tenant in common, or partner;⁷ and cases in which his estate is subject to a mortgage, pledge, or lien to another.⁸ But in most states, if not in all, each of these estates is held liable to some of the processes without statute, or is made so liable by statute.⁹ What are called future contingent estates may also be mentioned under this head. They are not estates at all, but only possibilities of future acquisition, and for that reason are not liable to the processes.¹ The sheriff cannot levy on a hope. The same reason exists, and the rule equally applies, as to property for the purchase of which the defendant is negotiating, but title to which he has not yet acquired; and so, as to money

⁵Freeman on Executions § 116; Kneeland on Attachment § 324; Rood on Garnishment §§ 153-154.

⁶Smith v. Niles, 20 Vt. 315, 49 Am. Dec. 782.

⁷Freeman on Executions §§ 125, 254a; Drake on Attachment § 248; Kneeland on Attachment § 328; Rood on Garnishment §§ 156-162.

⁸Freeman on Executions §§ 117, 120; Drake on Attachment § 245; Kneeland on Attachment §§ 325-327; Rood on Garnishment §§ 169-176.

⁹See the above, also; Moore v. Gilmore, cases 382; Smith v. Menominee Circuit Judge, cases 379.

¹Ducker v. Burnham, 146 Ill. 9, 37 Am. St. Rep. 135.

sent to pay a debt owing to him, but not yet paid over.² When, on the other hand, a creditor of the seller tries to get it, he is too late if the title has passed.³

§ 175. 4. THINGS EXEMPT. *Grounds Enumerated.* A thing within the scope of the judgment and process, which is property, and in which the defendant has a sufficient estate, may be exempt on any of several grounds. The principal grounds of exemption are the following: 1, that a statute makes the thing exempt for the use of the defendant and his family, so that they may be self-supporting and honorable members of society rather than burdens upon it; 2, that the seizure and sale would practically destroy the thing, which is sometimes called an equitable exemption; 3, that the personal security of every individual and the public peace would be endangered by allowing such seizure; 4, that the thing is serving the public in its present use, and that service would or might be interrupted by a seizure; 5, that the thing is now in the possession of some other state agency, and could not be taken by this court or officer without an unwarranted violation of the authority and interruption of the business of the other. Of these in their order.

§ 176. 1. *Statutory Exemptions.* Statutes exist in every state, making certain property exempt from all processes to enforce judgments and decrees. These statutes are not uniform. The courts construe them very liberally in favor of the debtors; for example, they are usually available to non-residents unless restricted to residents, extend to the proceeds while traceable and not put to some other use, and cannot be waived in advance by anything short of a pledge or mortgage.⁴

²*Buchanan v. Alexander*, cases 265; *Freeman on Executions* § 124; *Drake on Attachment* § 246; *Kneeland on Attachment* § 327; *Rood on Garnishment* §§ 57, 125.

³*Moore v. Davis*, cases 398; *Drake on Attachment* § 245a; *Rood on Garnishment* § 57.

⁴*Freeman on Executions* §§ 209, 250; *Drake on Attachment* § 244a; *Kneeland on Attachment* §§ 383-402; *Rood on Garnishment* §§ 82-107.

§ 177. 2. *Equitable Exemptions.* Some property otherwise liable is exempt, on the ground that extreme hardship would be inflicted on the defendant by the seizure and sale, without any commensurate gain to the creditor. For example, title deeds, bonds, and manuscripts are not property as such, but merely evidence of property; yet the material used to make the record has some value as waste paper. The law will not allow them to be sacrificed for this pittance.⁵ Again, growing crops would often be worth something in the immature state; but the law will not permit them to be so destroyed.⁶ So, of articles in course of manufacture which would be substantially destroyed by interference with them; for example, hides in a tan-vat, dough in a bake-oven, and bricks, charcoal, and potters' wares, being fired.⁷ So, of property so perishable that it would spoil before it could be sold. Yet the greater part of these difficulties may be avoided. The court may order the perishable property sold on the spot.⁸ Statutes usually provide that filing a notice of levy on growing crops shall be equivalent to an actual seizure, and that the crops may be left to stand till they mature. The sheriff may stand by till the process of manufacture is complete and then levy; or, though he cannot be compelled to do it, he may levy at once and complete the process of manufacture himself if he is willing to assume the risk of failure, in which case he is liable only for want of ordinary care.⁹

§ 178. 3. *Peace and Security Exemptions.* Property on the defendant's person is not liable, because the seizure of it is necessarily such an indignity to the wearer that a breach of the peace would be almost certain to follow. Moreover, the

⁵Oystead v. Shed, 12 Mass. 506. See ante § 173.

⁶Burleigh v. Piper, 51 Iowa 649; Penhallow v. Dwight, 7 Mass. 34, 5 Am. Dec. 21; Wallace v. Barker, 8 Vt. 440.

⁷Bond v. Ward, 7 Mass. 123; Wilds v. Blanchard, 7 Vt. 138.

⁸Attachment § 642, Century Digest, Vol. 5.

⁹Cheshire National Bank v. Jewett, 119 Mass. 241; Hale v. Huntley, 21 Vt. 147.

right to make such seizures would destroy the personal security of everyone, and open the door to numerous abuses.¹ The same reasons are at the foundation of the rule that the officer shall not break into the defendant's dwelling to levy on his property.²

§ 179. 4. *Public Service Exemptions.* The property of individuals and corporations which is being used in the public service—the cars on which the public is being carried, the water-works by which it is being supplied with water, even the coal being used to fire the engines that draw the cars or pump the water, or any other property being used in the public service—is exempt from seizure under any process as long as the service continues.³ The same reasons conspire with others, to be mentioned in the next paragraph, to prevent the property of public corporations being taken;⁴ and it has even been held that the fees of public officers could not be taken by garnishing the individuals owing them, because the appropriation of the fees to the payment of the debt might prevent the public from getting the service.⁵ Land was not liable under the feudal system; and the reason commonly given is that the public defense and revenues depended on the tenure. But now real property is liable by statute in every state.

§ 180. 5. *Jurisdictional Conflict Exemptions.* That the public business may be carried on with any success at all, it is necessary that no department of the state should interfere with the affairs of any other, except in the manner provided by law. Whenever any department of state takes possession of anything to do anything with it, no other department has any right

¹Holker v. Hennessey, cases 413; Mack v. Parks, 74 Mass. (8 Gray) 517, 69 Am. Dec. 267. In taking distresses at the common law this privilege extended to any chattel in actual use. Coke Lit. 47a. But the American cases do not allow the same privilege from levy under process. Potter v. Hall, 20 Mass. (3 Pick.) 368; State v. Dillard, 3 Ired. L. (N. Car.) 102, 38 Am. Dec. 708; ante § 159.

²Bailey v. Wright, cases 427; Burton v. Wilkinson, cases 316.

³Gardner v. Mobile & N. Ry. Co., cases 238.

⁴Klein v. New Orleans, cases 253.

⁵Sexton v. Brown, 72 Minn. 371, 75 N. W. 600.

to interfere, otherwise than for the purpose of supervising according to the authority given it. This fact prevents one constable from taking property out of the hands of another, even on a process from the same court;⁶ and, with greater reason, prevents any officer taking property from an officer of another court, and prevents every court from interfering with or attempting to command any person in carrying out the orders of any other court. Judgment debtors cannot be required to answer as garnishees in a court other than the one that rendered the judgment, because that would be interfering with the power of the court to enforce its judgment.⁷ Property being administered by probate courts cannot be taken from their officers on processes issued from other courts; nor can these officers be required to answer as garnishees in any other court, because the doing of either of these things would be interrupting the business and violating the jurisdiction of the probate court.⁸ Even property that has been released on bond is still exempt.⁹

9. THE LEVY AND SERVICE.

Matters Under this Head Reviewed.

§ 181. Having ascertained what may be taken, the officer would next have to decide what must be done to take it. That is the question to be answered under this head. What must be done depends upon the nature of the process in hand and the statutes affecting it. When attachments issue at the commencement of the action the officer receives a process consisting of two parts; or else the parts are wholly divided, and he receives two processes. In either case, one is a command to summon the defendant; the other, to attach his property.

⁶Hewe v. Moody, cases 365.

⁷Scott v. Rohman, cases 405.

⁸Hudson v. Saginaw Circuit Judge, cases 409.

⁹Hagan v. Lucas, cases 418.

Where the attachment issues in a pending action no new summons is necessary. While the garnishment process does not consist of these two distinct parts, it equally serves a double purpose—as original process commencing an action against the garnishee, and as a command to him to hold the defendant's property. An execution contains no command to summon, for the defendant has already had his day in court. However, many statutes require that the debtor shall be notified that the attachment or execution has been issued and levied, or that the garnishment has been issued and served. From what has been said it will be seen that the execution of the processes consists: 1, of levying on and disposing of the property of the defendant according to law and the command of the process; 2, of serving the original processes to commence the actions against the defendant and garnishee; and, 3, of serving the defendant with notice of the execution, attachment, or garnishment, and of what has been done under it, where such notice is required by the statute. These three will now be considered in the order named; but under the first, only the essentials to perfect the levy will be considered, the further proceedings to sale being reserved for subsequent topics.¹

The Levy.

§ 182. ON LAND. The modern statutes do not require any actual entry to effect a levy on land, but provide as a substitute that the officer shall indorse a certificate of levy upon his process, and that notice of this shall be filed in some public office. Under these statutes the lands must be described with the same certainty that is necessary to pass title by deed, and is not bound till the notice is filed as required.²

§ 183. ON CHATTELS. *What is Sufficient.* An actual levy is usually required in the case of chattels. To levy is to seize. The decisions are not entirely harmonious as to what

¹See §§ 208-212.

²McGregor v. Brown, cases 342; Hughes v. Streeter, cases 506.

constitutes a sufficient seizure; and probably much depends upon the manner in which the question arises, and the nature of the property seized. If the defendant has submitted to the levy, it is immaterial, so far as he is concerned, whether the officer ever saw or possessed the property.* A doubtful act and declaration of levy by the officer would estop him in an action by the defendant against him for a wrongful levy, though insufficient in a contest between two officers as to which had made the first levy. What would be considered no seizure of a buggy might be a sufficient levy on a red-hot casting or a herd of wild horses.* The test usually applied is to determine whether the officer so interfered with the property that he would be liable to an action of trespass by the defendant but for the protection of the process; and in this respect it is said that he must have touched the property or a part of it, or must have declared that he was levying on it while he was so situated that he could see it and might have touched it if he had wished to do so.⁵ Therefore, an officer who goes to a building to levy on its contents, and being unable to get in, proclaims at the door that he levies on all the property in the building, has made no levy, though he guard all the doors and windows so that no one could get in or out without his knowledge. An assignment after his alleged levy or an actual levy by another officer would prevail.⁶ Secret levies are void as to third parties. The

*Walker v. Shotwell, 21 Miss. (13 Sm. & M.) 544.

*Portis v. Parker, cases 286; Long v. Hall, 97 N. Car. 286.

PECULIAR LEVIES SUSTAINED.—A levy on corn in a crib by nailing it up, notifying the defendant and other spectators of the levy, and so leaving it without a guard, was sustained against a subsequent purchaser from the defendant. Richardson v. Rardin, 88 Ill. 124. A levy on hay in a barn by posting notice thereof on the door without moving the hay or leaving anyone in charge was sustained. Merrill v. Sawyer, 25 Mass. (8 Pick.) 397. Contra, Bryant v. Osgood, 52 N. Hamp. 182. A levy on grain in a stack by going to it and forbidding the defendant to touch it was sustained. Gallagher v. Bishop, 15 Wis. 276. See also: Polley v. Lenox I. W., 86 Mass. (4 Allen) 329; Mills v. Camp, 14 Conn. 219, 34 Am. Dec. 488; Davidson v. Waldron, 31 Ill. 120, 83 Am. Dec. 206; Bicknell v. Trickey, 34 Me. 273.

*Green v. Burke, cases 205; Hollister v. Goodale, cases 429.

*Meyer v. Missouri G. Co., 65 Ark. 286, 67 Am. St. Rep. 927, 45 S. W. 1062; Tafts v. Manlove, 14 Cal. 47, 73 Am. Dec. 610; Hibbard v. Zenor, 75 Iowa 471, 9 Am. St. Rep. 497, 39 N. W. 714.

levy should be so open and notorious that every one may know of it.⁷ The effect of failure to retain possession after levy will be considered later.⁸

§ 184. *When No Levy Is Necessary.* While the officer is in possession and control he cannot, in the nature of things, make a seizure; and no new seizure is necessary in such cases. The very act of delivering the process to him to be levied on property in his possession operates as a levy from the time of the delivery, without any act or intention on his part.⁹ Though the property be at the time in the actual possession of another person acting as keeper for the officer, no new formal levy is necessary; but not so, if the property has been returned to the defendant.¹

§ 185. *Order of Seizure, Inventory, Appraisement, Indorsement on Process, Etc.* The statutes make numerous requirements of the officer in executing the processes; for example, that he shall, at the time of receiving them, write down the hour; that he shall not take realty where there is plenty of chattels; that he shall make a written inventory of the property taken; that he shall indorse on the writ a statement that he has made the levy, describing the property taken, etc. Though these things are to be done before or at about the time of making the levy, they are no part of it. Levies should not be held void because these requirements are disobeyed; and in some cases should not be held even voidable, though they would usually be so.²

§ 186. *EFFECT OF FRAUD OR UNLAWFUL ACT.* A levy otherwise valid should be held to be voidable, most courts say void, if it is accomplished by means of any fraud or unlawful act; for no one should be permitted to take advantage of his

⁷Adler v. Roth, 5 Fed. Rep. 895, 2 McCrary 447.

⁸See post § 204.

⁹Pracht v. Pister, cases 179; Field v. Macullar, cases 432.

¹Bell v. Shafer, 58 Wis. 223, 16 N. W. 628; Tomlinson v. Collins, 20 Conn. 364.

²Field v. Macullar, cases 132; Freeman on Executions §§ 266, 259; and see ante §§ 31-45.

own wrong, and no lawful thing can stand on an unlawful foundation.³

Attachment and Garnishment Summonses.

§ 187. The essentials of valid service of summonses on garnishees and defendants in attachment differ in no respect from the essentials of service of any other original process. The one is necessary to get jurisdiction to render a judgment *in personam* against the defendant; the other, to render a similar judgment against the garnishee.⁴ Defects in the service which would not be fatal on other processes should not, to my mind, be held fatal in these cases; but there are decisions which make distinctions on the ground that these proceedings are statutory. Appearance by the defendant without service or after defective service waives the objection; and appearance by the garnishee waives the defect in the service as a summons—several courts say, as an attachment also.⁵

Notice of the Attachment, Garnishment, or Execution.

§ 188. The notice often required by statute to be given by the officer to the defendant or to the person found in possession, to inform him of the levy of the execution or attachment or the service of the garnishment, must not be confounded with the summons spoken of in the preceding section. No such notice is necessary unless the statute requires it; and failure to give it if required, or when or as required, would seem, on principle, to be a mere irregularity, rendering the levy or service liable to be quashed on proper application by one entitled to complain.⁶ But there is a prevalent disposition on the part of the courts, while acknowledging that this would be the only

³Holker v. Hennessey, cases 413; Bailey v. Wright, cases 427.

⁴Compare Pennoyer v. Neff, cases 48.

⁵Rood on Garnishment § 271.

⁶See ante §§ 31-45.

effect in case of executions, to consider this notice jurisdictional in cases of attachment and garnishment, apparently on the ground that these proceedings are statutory.⁷

10. LIENS UNDER JUDGMENTS, ATTACHMENTS, GARNISHMENTS AND EXECUTIONS.

Time When Right Begins.

§ 189. AT COMMON LAW. When the statutes passed in the reign of Edward I first made lands liable to execution to satisfy judgments, the courts held that the land was liable on the judgment of a citizen from the time the judgment was rendered, on recognizances and statutes merchant and staple from the day the recognizance or statute was acknowledged, and on the demand of the king from the day when the liability was incurred. These decisions did not depend upon any provisions of the statutes.⁸ The courts felt that a lien from these dates respectively was necessary, lest the defendant should defeat the judgment by conveying his property away.⁹ The same rule has been adopted by several of the American courts where the writ of *elegit* was used, and might with equal propriety be applied to the use of the *fiери facias*; but I am not aware of its being so applied in states where no lien is provided for by statute, and in most states a statutory lien is given.¹ But the common law judges felt that too great mischief would result from holding the chattels liable to execution from the day the judgment was rendered; and, therefore, they held that

⁷Freeman on Executions §§ 257, 262; Rood on Garnishment §§ 280-283.

⁸Massingill v. Downs, 48 U. S. (7 How.) 760.

⁹Harbert's Case, cases 137; Anonymus, cases 434; Fleetwood's Case, cases 435.

¹Woods v. Mains, cases 436.

the plaintiff could have execution only of the chattels which the defendant had the day the execution was sued out, or which he afterwards acquired, and not of those which he had sold between the day on which the judgment was recovered, and the day of execution sued.²

§ 190. UNDER THE STATUTE OF FRAUDS. In promulgating these rules, probably the judges were not thinking of judgments having effect before they were rendered, nor of executions dated back and withheld from the officer. But by a fiction of the common law, all judgments were presumed to have been rendered on the first day of the term, and the lien upon lands dated from that time; so that a bona fide purchaser might lose his property by the lien of a judgment rendered after his purchase. A practice also obtained of dating back executions to the first day of the last preceding term; and, worse than this, it became customary to take out executions for the purpose of obtaining security, or perhaps of protecting the debtor, without any intention of delivering them to the officer to be executed. By this means chattels were taken from persons who had purchased them for value without notice of the judgment, and perhaps a considerable time before it was rendered. These evils induced the provisions in the Statute of Frauds, 29 Charles II. c. 3 §§ 13-16, that the officer signing the judgment record shall put down the exact day of doing so, that the judgment shall be a lien upon the land only from that time, and that no *fiery facias* or other execution shall bind the goods of the defendant till it is delivered to the officer to be executed. In most of the American states the provisions of this statute with regard to liens upon land are substantially embodied in their statutes; and in nearly half of the states, as

²Anonymous, cases 434, 435; Fleetwood's Case, cases 435; Boucher v. Wiseman, cases 332; Green v. Johnson, cases 447.

indicated below, the provision with regard to chattels is also followed.³

§ 191. MODERN AMERICAN RULE. Under the Statute of Frauds the defendant might sell his chattels for value to an innocent purchaser after the sheriff had received his writ and before he had done anything to give notice of the lien; from which it will be seen that the statute did not entirely obviate the old evil. In the absence of any statute governing the matter, the supreme court of Iowa held that they could not adopt the old common law rule, which was so unjust that it had to be changed by statute, and that the commercial spirit of our age is so averse to secret liens that they could not recognize any claim by the creditor till the moment of levy.⁴ Similar considerations have induced the legislatures in a number of states, and the number is still increasing, to adopt the same rule. Notable among these, may be mentioned, North Carolina and Tennessee, where the old common law rule of liens from the teste of

³*Alabama*: "A writ of fieri facias is a lien * * * from the time only that the writ is received by the officer." Code (1896) § 1892; *Hamilton v. Phillips*, 120 Ala. 177.

Arkansas: Rev. Stat. (1894) § 3048; *Davis v. Oswalt*, 18 Ark. 414.

Colorado: Rev. Stat. (1883) § 1846; *Joslyn v. Spangler*, 13 Colo. 491.

Delaware: Rev. Code (1893), c. 111, § 63; *Taylor v. Horsey*, 5 Harr. 131.

Florida: *Love v. Williams*, 4 Fla. 126.

Illinois: On executions from courts of record; *Hurd's Stat.* (1899) c. 77, § 1; *Hanchett v. Ives*, 133 Ill. 332; on justice court executions; *Hurd's Stat.* c. 79 § 124.

Indiana: *Thornton's Rev. Stat.* (1897) § 706; *Moss v. Jenkins*, 146 Ind. 589.

Kentucky: Stat. (1894) § 1660; *Soaper v. Haward*, 85 Ky. 256.

Maryland: *Prentiss P. & S. Co. v. Whitman*, 88 Md. 240.

Mississippi: *Lynn v. Gridley*, Walker 548.

Missouri: Rev. Stat. (1899) § 3171; *Field v. Milburn*, 9 Mo. 488.

New Jersey: 2 Gen. Stat. (1895) p. 1418, §§ 18-20; *James v. Burnet*, 20 N. J. L. (Spencer) 635.

New York: Code Civ. Proc. (1892) §§ 1405, 1406; *Lambert v. Paulding*, 18 Johns. 311.

Pennsylvania: B. & P. Dig. (1894) p. 839, § 63; *Wilson's Appeal*, 90 Pa. St. 370.

Virginia: Code (1887) § 3587; *Frayser v. Richmond, etc. Co.*, 81 Va. 388.

West Virginia: Code (1891) c. 141, § 2; *Hiant v. Hays*, 38 W. Va. 681.

Reeves v. Sebern, cases 456.

the writ had long prevailed.⁵ The lien of the execution before levy has thus been entirely abolished in the states named below.⁶

§ 192. ATTACHMENTS AND GARNISHMENTS. Attachment of property, except as a species of distress, was unknown to the common law; and, therefore, we have no old decisions as to when the lien of an attachment commences. The attachment statutes in Arkansas,⁷ Indiana,⁸ and Kentucky⁹ provide that the lien shall attach from the delivery of the writ; in Pennsylvania it relates to the *teste*, provided that it shall be defeasable by any bona fide purchase before levy;¹ and in Tennessee the attachment in chancery is made a lien from

⁵N. Car. Code (1883) § 428; *Weisenfield v. McLean*, 96 N. Car. 248; *Stahlman v. Watson*, Tenn. Ch. App. (1897), 39 S. W. 1055; *Anderson v. Taylor*, 74 Tenn. (6 Lea) 382. The old common law rule still prevails in Tennessee as to chattels capable of manual seizure. *Edwards v. Thompson*, 85 Tenn. 720.

⁶*California*: "Until a levy property is not affected by the execution;" Code Civ. Proc. (1886) § 688.

Idaho: Rev. Stat. (1887) § 4477.

Iowa: Code (1897) § 3970.

Kansas: Gen. Stat. (1897), Code Civ. Proc. § 454.

Louisiana: Garland's Code (1894) § 722.

Michigan: Comp. Laws (1897) §§ 10312, 9224; *French v. DeBow*, 38 Mich. 712.

Minnesota: "Until a levy property * * * is not affected by the execution;" Stat. (1894) § 5449; *Albrecht v. Long*, cases 333.

Montana: "Until levy property is not affected by the execution;" Code Civ. Proc. (1895) § 1218.

Nebraska: Comp. Stat. (1901) § 6056.

Nevada: Comp. Laws (1900) § 3314.

New Mexico: Comp. Laws (1897) §§ 3127, 3133.

North Dakota: Rev. Code (1895) § 5511.

North Carolina: Code (1883) § 448.

Ohio: Bates's Stat. (1898) § 5375; *Murphy v. Swadener*, 33 Ohio St. 85.

Oklahoma: Code (1893) § 4336; *Burnham v. Dickson*, 5 Okl. 112.

Oregon: Hill's Laws (1892) Code Civ. Proc. § 283, part 5; 17 Ore. 343.

South Carolina: Rev. Stat. (1894) Code Civ. Proc. § 310; *Bachman v. Sulzbacher*, 5 S. Car. 58.

South Dakota: Ann. Stat. (1901) § 6339.

Utah: Rev. Stat. (1898) § 3240.

Washington: Bal. Code & Stat. (1897) § 5269, part 5.

Wisconsin: S. & B. Stat. (1898) § 2985; *Knox v. Webster*, cases 328.

Wyoming: Rev. Stat. (1899) § 3829.

⁷Mansf. Dig. § 325; *Simon v. Adler-Goldman Com. Co.* (1892), 56 Ark. 292.

⁸Thornton's Rev. Stat. (1897), § 942; *Shirk v. Wilson*, 13 Ind. 129.

⁹Code Civ. Proc. (1895) § 212.

¹Brightley & Purdey's Dig. (1894) p. 698, § 23, 24.

the filing of the bill." Some of the statutes expressly provide that the lien shall date from the levy;³ but the most of them contain no provision concerning it; and where such is the case it has been universally held that the attachment creates a lien from the time the goods are actually levied,⁴ and not before,⁵ even by courts that had held in the absence of controlling statutes that an execution creates a lien from the time it is issued,⁶ or from the time the officer received it.⁷ So, also, garnishment is held to create a lien upon the property in the hands of the garnishee from the date of the service of the writ upon him,⁸ and not before.⁹

³Code § 3507; *Sharp v. Hunter*, 47 Tenn. (7 Cald.) 389.

⁴*Alabama*: Code (1896) § 548; *Bamberger v. Voorhees*, 99 Ala. 292.

Arizona: Rev. Stat. (1897), Attachment § 67, Garnishment § 81.

Georgia: Code (1895) § 4578; *Silvey v. Phoenix*, 94 Ga. 609.

Iowa: Code (1897) § 3898, land from filing the abstract § 3899.

Michigan: Comp. Laws (1897), Attachment §§ 10563, 10564; Garnishment § 991; on land from filing abstract, *Davis Sewing M. Co. v. Whitney*, 61 Mich. 518; not good against equitable titles, *French v. DeBow*, 38 Mich. 712.

Missouri: Rev. Stat. (1899) § 388, as to land from filing abstract; *Stan-ton v. Boschert*, 104 Mo. 393.

New Jersey: Gen. Stat. (1895), as to chattels, p. 101, § 17.

North Dakota: Rev. Code (1895) § 5362.

Ohio: Bates's Stat. (1898) § 6512.

South Carolina: Rev. Stat. (1893) § 2493.

Virginia: Code (1897) § 2971.

⁵*Pond v. Griffin*, 1 Ala. 678; *Martin v. Dryden*, 6 Ill. (1 Gil.) 187; *Coffin v. Ray*, 42 Mass. (1 Metc.) 212; *Redus v. Wofford*, 12 Miss. (4 S. & M.) 579, 592; *Shacklett's Appeal*, 14 Pa. St. 326; *Vinson v. Huddleston*, 3 Tenn. (Cooke) 254; *Riordan v. Britton*, 69 Texas 198.

⁶*Taffts v. Manlove*, 14 Cal. 47, 73 Am. Dec. 610; *Kuhn v. Graves*, 9 Iowa 303; *May v. Buckhannon R. L. Co.*, 70 Md. 448; *Burkhardt v. Sanford*, 7 How. Pr. (N. Y. Sup.) 329; *Morehead v. Western N. C. R. Co.*, 96 N. Car. 362; *Poling v. Flanagan*, 41 W. Va. 191, 23 S. E. 685.

⁷*Morehead v. Western N. C. R. Co.*, 96 N. Car. 362.

⁸*May v. Buckhannon R. L. Co.*, 70 Md. 448.

⁹*Aderholt v. Smith*, 83 Ala. 486, 3 South. 794; *Raventas v. Green*, 57 Cal. 254; *Shaver W. & C. Co. v. Halsted*, 78 Iowa 730, 43 N. W. 623; *Allen v. Hall*, cases 140; *Northfield Knife Co. v. Sharpleigh*, 24 Neb. 635, 39 N. W. 788; *Barton v. Spencer*, 3 Okl. 270, 41 Pac. 605; *Carter v. Koshland*, 13 Ore. 615, 12 Pac. 58; *Focke v. Blum*, 82 Texas 436, 17 S. W. 770; *Erskine v. Staley*, cases 458; *Maxwell v. Bank of New Richmond*, 101 Wis. 286, 77 N. W. 149; *Contra*, *Bigelow v. Andress*, 31 Ill. 322.

¹⁰*Fisher v. Hall*, 44 Mich. 494, 7 N. W. 72.

Nature of the Lien or Right.

§ 193. **AGAINST THE OFFICER.** For any breach of his duty, the officer is liable to the plaintiff in an action against him as an individual, in an action on his official bond, and by summary proceedings in the court and cause in which the wrong was committed. The nature of the creditor's right has already been sufficiently discussed in considering his right to control the processes, and in speaking of the liability of the officer; and what was then said need not be here repeated.¹

§ 194. **IN THE PROPERTY.** *Before Levy.* A judgment lien on land is superior to an execution lien on chattels, in that it is not cut off by a levy and sale under a junior judgment.² The creditor's lien on chattels before levy, where such a lien is allowed, is not an interest in any specific property of the debtor; but merely a right to have it taken to satisfy the judgment. For example, the legislature may exempt the property by a law passed after the officer receives the process;³ or the defendant may acquire the benefit of the statute by marrying during that time.⁴ Again, if the officer fails to levy before the return day the lien expires;⁵ and it is liable to be defeated before that time by a levy under a junior process from another court,⁶ but not by a prior levy by the same officer or his deputy under a junior process from the same court.⁷ Again, he cannot maintain a suit in equity to require third persons to deliver property to the sheriff to be levied on under his process,⁸ nor at law to recover damages for concealing or injuring property which he might have levied upon.⁹ His right to maintain an

¹See ante § 157.

²Kirk v. Vonberg, 34 Ill. 440.

³Horton v. McCall, 66 N. Car. 159; Ladd v. Adams, same 164. But see: Edwards v. Kearzey, cases 299; Massingill v. Downs, 48 U. S. (7 How.) 760.

⁴Watson v. Simpson, 5 Ala. 233.

⁵See ante § 163.

⁶Pulliam v. Osborne, cases 454. Compare Green v. Johnson, cases 447.

⁷Kennon v. Ficklin, cases 451; Richards v. Morris C. & B. Co., cases 453.

⁸Skinner v. Stuart, 39 Barb. Sup. 206.

⁹Wellington v. Small, 57 Mass. (3 Cush.) 145; Lamb v. Stone, 28 Mass. (11 Pick.) 527.

action against the defendant and others at law for a conspiracy to defraud him by keeping the property beyond his reach,¹ or in equity to set aside a fraudulent conveyance² have been denied on this ground; but no lien is necessary to maintain such actions, and they should be sustained. His right to have the property taken, if it can be found, is not defeated by a sale for value to an innocent purchaser,³ by the death of the defendant,⁴ by his becoming a bankrupt,⁵ nor by a removal of the property to another county and sale by the defendant to an innocent purchaser,⁶ or levy under the writ of another creditor there,⁷ provided the property is returned and levied before the return day or a *testatum fieri facias* is issued to the other county and levy made thereunder.

§ 195. *After Levy.* The levy does not divest the defendant of his title; he may sell or mortgage as before.⁸ The judgment lien on land does not unite with the lien of the execution or levy. A person who buys land subject to the judgment lien but before the lien of the execution attaches, gets title free from the claim of the creditor if the judgment lien expires before the sheriff's sale, though it had not expired before the levy.⁹ Yet the judgment lien on land and the lien of a levy on chattels are very similar. The creditor who loses thereby may maintain an action on the case against anyone who injures the land on

¹Findlay v. McAllister, 113 U. S. 104; Finney v. Harding, 136 Ill. 573, 27 N. E. 289; Quinby v. Strauss, 90 N. Y. 664; Kerr on Fraud and Mistake, *201.

²Hendricks v. Robinson (per Chancellor Kent), 2 Johns. Ch. 283, affirmed without opinion in 17 Johns. 438; Pettus v. Smith, 4 Rich. Eq. (S. Car.) 197.

³Anonymous, cases 435; Boucher v. Wiseman, cases 332.

⁴Parsons v. Gill, cases 189.

⁵Savage v. Best, 44 U. S. (3 How.) 111.

⁶Mitchell v. Ashby, 78 Ky. 254; Street v. Duncan, 117 Ala. 571.

⁷Hill v. Slaughter, 7 Ala. 632; Lambert v. Paulding, 18 Johns. (N. Y.)

311.

⁸Bigelow v. Willson, 18 Mass. (1 Pick.) 485.

⁹Wells v. Bower, 126 Ind. 115, 22 Am. St. Rep. 570, 25 N. E. 603.

which he has a judgment lien or lien by levy;¹ a garnishing creditor may maintain a similar action against anyone who interferes with the defendant's property in the garnishee's possession;² and an attaching or execution creditor may maintain a similar action for such injury whenever he has no other remedy.³ There are several decisions in which such actions were dismissed on the ground that the plaintiff's only remedy was against the officer, and only the officer acquired an interest by the levy;⁴ or on the ground that the creditor's remedy against the officer was exclusive wherever he had a remedy against the officer;⁵ or on the ground that the plaintiff had not shown that there was not sufficient other property to satisfy his claim.⁶ Probably these courts would agree with the decisions holding that after purchasing at the sale he may sue in trover for a conversion before the sale.⁷ But there are other cases in which actions by the creditor at law and in equity have been sustained against third persons interfering with the property in the officer's possession, although the creditor had a right of action against the officer;⁸ and these last mentioned decisions seem to me correct. Of course, a creditor having a lien by levy could not maintain trespass, trover, or replevin against anyone for interference with the property, for he has no right of possession.⁹ If the creditor

¹Yates v. Joyce, 11 Johns. (N. Y.) 136.

²Erskine v. Staley, cases 458.

³Adams v. Paige, 24 Mass. (7 Pick.) 542.

⁴North v. Ladd, 2 Mass. 514; Foulks v. Pegg, 6 Nev. 136.

⁵Kelly v. McCaw, 29 Ala. 227; Barker v. Mathews, 1 Denio 335.

⁶Marsh v. White, 3 Barb. Sup. (N. Y.) 518. Overruled by Quinby v. Strauss, 90 N. Y. 665.

⁷Baker v. Beers, 64 N. Hamp. 102, 6 Atl. 35.

⁸Field v. Macullar, cases 432, and cases there cited; Howland v. Willetts, 9 N. Y. 170; Shull v. Barton, 58 Neb. 741, 79 N. W. 732; Freeman on Executions, § 268.

⁹Goddard v. Perkins, 9 N. Hamp. 488; Blake v. Shaw, 7 Mass. 505; Schaeffer v. Marienthal, 17 Ohio St. 184.

would rather have the property itself or its proceeds than look to the sheriff or third persons, he may have it retaken after the officer has abandoned it, provided he can get it before it is encumbered or levied upon under another process.¹ If the same officer has sold it under a junior process he may have the proceeds paid over to him on motion to the court before they are paid out,² or sue the junior creditor for them after they are paid,³ but he cannot take the property from the purchaser at the sale under the junior writ, for that would destroy the faith in sheriff's sales.*

II. HOW LIEN LOST AFTER LEVY.

By Order of Court in Proceedings to Try.

§ 196. JURISDICTION. Independent of any statute, from the necessity of the case, every court has jurisdiction to quash any garnishment, attachment, execution, or other proceeding, pending before it, either before or after the levy or service has been made;⁵ and no other court has any right to do so,⁶ except as a court of review. The power of the judge to quash writs and levies during vacation is very doubtful, to say the least,⁷ unless given by express statute, as it usually is with reference to attachments. Many statutes empower court commissioners or the court's clerk to quash attachments during vacation when the judge is absent.

¹*Erskine v. Staley*, cases 458, and notes.

²*Kennon v. Ficklin*, cases 451; *Richards v. Morris C. & B. Co.*, cases 453.

³*Field v. Macullar*, cases 432, and cases cited.

⁴*Smallcomb v. Cross*, cases 445.

⁵*Commonwealth v. Magee*, cases 307; *Chase v. DeWolf*, 69 Ill. 47; *Bailey v. Hester*, 101 N. Car. 538.

⁶*Scrutchfield v. Sauter*, 119 Mo. 615, 24 S. W. 137; *Arthurs v. Villere*, 43 La. An. 414, 9 South 126. Equity courts give relief by injunction in certain cases where there is no remedy at law. *Emerson v. Detroit S. & S. Co.*, cases 168.

⁷*Commonwealth v. Magee*, cases 307 notes.

§ 197. WHO MAY COMPLAIN. The plaintiff certainly has standing to invoke the court's action to quash his process and levy, though he seldom asks the favor. The defendant is equally entitled, and is usually the party moving for such action. In the absence of statutory provision, strangers claiming to own tangible property levied upon are generally considered to have no standing to invoke any action in the proceedings, and as having a sufficient remedy by replevin,* trespass, and trover for the property or its value. Statutes usually provide that any claimant may intervene, and where such is not the case persons interested in the property as other creditors of the same debtor having liens upon it will usually be admitted.⁸ But there are several courts in which the right has been denied. They say, "Courts of justice are not open, like tournaments, for errant knights to enter and tilt at pleasure."⁹

§ 198. PROCEDURE. A bill in chancery for an injunction, and proceedings in a court of review on error, mandamus, certiorari, and prohibition, are not generally appropriate nor available if there is a remedy in the court that issued the process. Proceedings by *audita querela* in the same court was the remedy formerly employed to obtain relief from unjust levies; and this may still be used, no doubt, if not abolished by statute. But a simple motion, in the same court and cause, with reasonable notice to the other persons interested, is so much cheaper, easier to prosecute, and more expeditious, that it is almost the only procedure now in use; except where a special procedure is provided for by statute, as to which the statutes of the state should be consulted.¹

§ 199. GROUNDS. *Classified.* The court may order the process or levy quashed or adjudge the lien subordinate: 1,

*Freeman on Executions § 75; Drake on Attachment §§ 272 et seq., 419; Rood on Garnishment, § 335; Hawes v. Clement, cases 159.

⁸Porter v. West, 64 Miss. 548, 8 South. 207; Rood on Garnishment § 335.

¹See Hawes v. Clement, cases 159; Wade on Attachment § 276.

because it is absolutely void, and this objection is available to anyone in any form of procedure; 2, because the rights of other persons require it to be quashed or made subordinate, though it be not void.

§ 200. *Available to Defendants.* The defendant may have the process or levy quashed because of any irregularity not amendable nor waived—for example, that the affidavit, bond, or process was too early or too late, not executed or improperly executed, or did not contain all of the essential parts;² or because the facts alleged to obtain the attachment did not exist—for example, that the defendant had absconded, was a non-resident, or fraudulently contracted the debt sued for;³ or because the cause of action had been extinguished since the attachment was issued, or the judgment on which the execution issued had been satisfied, either before or after the process issued.⁴ Or, admitting that the preliminary requirements were observed and that the process is regular, he may have the levy quashed, because of any fraud or illegal act in effecting the levy, and for many irregularities; or because the property is exempt. But he cannot object that the property belongs to another, and is being used to pay his debts; that is his good fortune.⁵ He will not be allowed to deny that he owes the debt for which the attachment issued, for that would require a trial of the merits of the action.⁶ He cannot urge that the judgment on which the execution issued is incorrect, for he has had one day in court on that question.”

§ 201. *Available to Claimants and Garnishees.* Claimants who intervene may have the process or levy quashed if it is absolutely void, or upon allegation and proof that it is being

²Drake on Attachment § 414 et seq.; Wade on Attachment § 284 et seq.

³Wade on Attachment § 277 et seq.; Attachment §§ 788, 789, Century Digest, Vol. 5.

⁴Wills v. Chandler, cases 186; Adams v. Smallwood, cases 199.

⁵Burnham v. Ramge, 47 Neb. 175, 66 N. W. 277. But see McDougall v. Lamb, 113 Mich. 69, 71 N. W. 458.

⁶Drake on Attachment § 418; Hawes v. Clement, cases 159.

⁷See ante § 72.

used as an instrument to defraud them as creditors of the same debtor. But they will not be permitted to litigate matters between themselves, show that the defendant does not owe the amount claimed of him by the plaintiffs, take advantage of any irregularities in the proceedings, nor show that the property attached does not belong to the defendant. The issue is whether the property belongs to them, not whether it belongs to the defendant.⁸ The court will protect any interest, legal or equitable, which they prove belongs to them.⁹ While a garnishee may show that the property does not belong to the defendant, and may take advantage of jurisdictional defects in the principal action, he can object to no irregularities except those in the proceedings against himself.¹

Matters Which Abate the Lien.

§ 202. ABANDONMENT. *By Election of Remedies.* When a creditor has an election between several remedies without a right to pursue more than one his choice of any one is an abandonment of any rights he might have under the others. Thus, when a man having a judgment lien on land sues out a *capias* and imprisons the defendant under it, and afterwards obtains recourse against the land by the release of the debtor, he takes it subject to all rights acquired during the interval.² But when a creditor may proceed under several processes at the same time his action under any one does not disparage his right to proceed subsequently under any other;³ and a levy on certain property by the officer, even at the direction of the creditor, is not an abandonment of the lien which the delivery of the writ to him created on any other property necessary to satisfy it. A subsequent levy on the other property during

⁸Markley v. Keeney, 87 Iowa 398, 54 N. W. 251; Gilkeson v. Bond, 44 La. An. 841, 11 South 220; Wade on Attachment § 220; Rood on Garnishment §§ 342-344.

⁹Rood on Garnishment § 349.

¹Rood on Garnishment § 226.

²Rockhill v. Hanna, cases 470.

³Spring v. Ayer, cases 197; Sutton v. Hasey, cases 198.

the life of the writ will overreach all rights acquired after the lien commenced.⁴

§ 203. *By Dropping the Proceedings.* No doubt the lien should be, as it has often been, held to be abated by settlement and abandonment of proceedings without completing them,⁵ or by appropriating the property levied on and abandoning without settlement.⁶ Returning the process, taking out another, and making a levy under it on other property have been held not to show an abandonment;⁷ and when the new levy is on the same property the whole proceedings under the second process may be treated as mere surplussage and the sale sustained as if made under the first.⁸

§ 204. *By Surrendering Possession.* If the officer or garnishee abandons without the plaintiff's knowledge or consent he is entitled to have the property retaken,⁹ but the rights of innocent persons acquired during the interval will be protected.¹ There are a great many cases in which it is stated in broad terms that the retention of possession is essential to the continuance of the lien; but most of these are cases in which the rights of other persons have intervened, and the great majority of the cases hold that the lien is not lost by the officer's leaving the property in the possession of the defendant.²

§ 205. *LACHES AND ABUSE OF PROCESS.* Mere delay in prosecuting is not an abandonment; but from it the court or jury may find an intention to abandon, and very slight delay

⁴Moses v. Thomas, 26 N. J. L. 124; Schuylkill County's App., 30 Pa. St. 358; Stewarts v. Reynolds, 4 Harr. (Del.) 112; Trapnall v. Richardson, 13 Ark. 543, 58 Am. Dec. 338, modifying Anderson v. Fowler, 8 Ark. (3 Eng.) 388. Contra, Lessee of Walpole v. Ink, 9 Ohio 142.

⁵Wilder v. Weatherhead, cases 484.

⁶Allen v. Hall, cases 140.

⁷Friyer v. McNaughton, 110 Mich. 23.

⁸Evans v. Barnes, cases 468.

⁹Erskine v. Staley, cases 458; Field v. Macullar, cases 432; Smith v. Osgood, cases 318; Banks v. Evans, 10 Sm. & M. (Miss.) 35, 48 Am. Dec. 734.

¹Otey v. Moore, 17 Ala. 280, 52 Am. Dec. 173; Commonwealth v. Contner, 18 Pa. St. 439; McGarry v. Lewis Coal Co., 93 Mo. 237, 6 S. W. 81.

²Conn v. Caldwell, cases 425; Acton v. Knowles, cases 464; Drake on Attachment § 290 et seq.; Freeman on Executions § 261.

has often been adjudged such an abuse of process as will entitle a junior creditor to priority. No delay by the officer without the plaintiff's authority or knowledge will have this effect; but an unreasonable delay will justify the jury in finding knowledge and sanction by the creditor.³

§ 206. FAILURE OF THE ACTION OR JUDGMENT. The lien by garnishment is abated by the death of the garnishee before judgment against him or by the death of the defendant before judgment against him unless the statute provides otherwise; and the same is true of attachment. But the lien of an execution levied is unaffected by the death of either party.* Cases are numerous in which the lien has been held to be abated by departures from the prescribed procedure, but this question has been sufficiently discussed already.⁵ A judgment and the lien of the execution thereon may be allowed to subsist while the judgment is opened to try a special defense;⁶ and an appeal, motion for a new trial, and the like, would have no effect on the execution or lien. But if the judgment be absolutely set aside the foundation of the execution is gone, and it must fall; and with it, the lien.⁷ So if the execution be set aside. Likewise, if judgment be given for the defendant in any action, all attachments and garnishments pending thereon must fall unless saved by a proper appeal.⁸

§ 207. SUBSTITUTE BOND. The cases are not agreed as to whether the lien of the levy is divested by the defendant giving a bond to obtain a release, replevin, appeal, new trial, injunction, or stay of proceedings; but it is substantially agreed that no such effect would follow the giving of any bond by a claimant.⁹

³Acton v. Knowles, cases 464.

⁴See ante § 119.

⁵See ante §§ 134, 140; and post §§ 211, 212.

⁶Richards v. Morris C. & B. Co., cases 453; Reid v. Lindsey, cases 479.

⁷Notes to Reid v. Lindsey, cases 482.

⁸Erickson v. Duluth, S. S. & A. Ry. Co., cases 473.

⁹Rocco v. Parczyk, cases 477; Reid v. Lindsey, cases 479; Hagan v. Lucas, cases 418.

12. FORECLOSURE OF THE LIEN.

Of What it Consists.

§ 208. IN ATTACHMENT AND GARNISHMENT. The lien which the creditor acquires by an attachment levy can be foreclosed only by prosecuting the action against the defendant to judgment, and having the property sold on an order to sell or execution issued on that judgment. We need not consider the steps required to obtain a judgment, since they are the same in such cases as in other actions. Likewise, the lien acquired on property by garnishment can be perfected only by prosecuting the principal action to judgment if that has not already been done, and by prosecuting the garnishment to judgment against the garnishee. When the garnishee is charged as bailee, that is, for specific tangible property in his possession, it is also necessary to take out execution, levy it on the property, and proceed to sale as in other cases; or, if the garnishee fails to produce the property on demand, to levy upon and sell any of his executionable property to an equal amount. But when the garnishee is charged as debtor he may safely pay the money into court or to the plaintiff as soon as the judgment is rendered and recorded against him, without waiting for execution to issue.¹

§ 209. PROCEEDINGS IN GARNISHMENT FROM SUMMONS TO JUDGMENT. The summons to the garnishee gives him a certain time, named therein or in the statute, until which he is not liable to default for not answering. Under some statutes his answer is a mere formal pleading; but under most statutes the plaintiff is entitled to a personal examination, on oral interrogatories, in open court, either in the first instance or upon an unsatisfactory answer being made.² If the garnishee be a corporation the plaintiff is entitled to an answer by some agent having knowledge of the facts. If the plaintiff is satisfied with the answer he may allow the cause to be continued

¹Barber v. Howd, 85 Mich. 221; Rood on Garnishment § 209.

²See Graighe v. Notnagle, cases 234.

till he is ready to take judgment, being careful not to entitle the garnishee to have it dismissed for laches.³ But if the garnishee has not confessed liability the plaintiff must join issue on the answer or file a supplemental complaint, according to the practice, bring the issue to trial, and adduce such evidence as would prove liability in an action by the defendant against the garnishee; or the garnishee will be entitled to a discharge. The trial of this issue is conducted very much the same as other trials.⁴

§ 210. CONDUCT OF EXECUTION SALES. The statutes usually specify with considerable particularity: 1, what notice of the sale shall be given—for how long, in what language and publication, where posted, who personally notified, etc.; 2, where and when the sale shall be held—on the premises, at the county seat, on a business day, between nine a.m. and six p.m., etc.; 3, how the sale shall be conducted—personalty offered before realty, at auction, to the highest bidder, for cash, in parcels, within view of the property, after clearly pointing it out, etc.; 4, what the officer shall do after the sale—in disposing of the proceeds, in giving evidence of title to the purchaser, in making report of his doings to the court, etc. Obviously it would be out of place to attempt a discussion of each of these requirements at length in a treatise of this kind. The requirements are quite different in different states and the student is referred to the statutes. To the statutory requirements the courts have added others; for example, that the officer shall not directly or indirectly buy at the sale, that he must be otherwise competent as hereinbefore indicated, etc.

Effect of Defects.

§ 211. Without attempting to speak of each of the requirements in detail, it may be said, that if the property is simply handed over to the creditor without a sale, or the garnish-

³See *Webber v. Bolte*, cases 390.

⁴*Hewitt v. Wager Lumber Co.*, cases 403. On all the matters in this section see *Rood on Garnishment* §§ 352-382.

ment is dropped on payment by the garnishee to the creditor without the garnishment being carried to judgment, the title of the defendant is not divested, and the creditor acquires none of which he can avail himself even on collateral attack.⁵ On the other hand, it seems pretty clear that the proceedings are not liable to collateral attack because of any irregularities in them. If the officer has sold without the proper notice, at an improper time or place, *en masse*, on credit, or the like, he may be liable to an action by anyone injured who has not waived his right to sue; and, on that ground, the sale would be set aside on a proper application by anyone prejudiced by the default. But it is not liable to collateral attack.⁶ The sheriff's deed is not void because it misdescribes the judgment, or does not describe it at all.⁷

The Officer's Return.

§ 212. The purchaser's title does not depend on the officer making a true return or any return at all, nor on his accounting for the proceeds.⁸ The officer's return is his report to the court of his doings under the process; and should be in writing, on the back of the process or on some paper attached thereto, dated, and signed; and should state in detail just what the officer has done, and not merely that he has executed the process according to law. A return is never too late to be valid;⁹ but the officer is liable to amercement by the court, or an action for damages by the party injured, if he fails to return it on or before the return day.¹ The return may be amended by the officer without consent of the court at any time before the officer surrenders possession of it; but afterwards, only on special order.²

⁵Allen v. Hall, cases 140; Wilder v. Weatherhead, cases 484.

⁶Cavanaugh v. Jakeway, cases 487; Conley v. Redwine, 109 Ga. 640, 77 Am. St. 398; Herman on Executions § 342; Freeman on Executions § 339.

⁷Hill v. Reynolds, 93 Me. 25, 44 Atl. 135, 74 Am. St. Rep. 329.

⁸Herman on Executions § 343; Freeman on Executions § 341.

⁹Smith v. Osgood, cases 318; Rowe v. Hardy, 97 Va. 674, 75 Am. St.

811.

¹Burk v. Campbell, cases 343; McGregor v. Brown, cases 342.

²Nelson v. Cook, 19 Ill. 440.

B. WHAT CONSTITUTES A SATISFACTION.

Review and Prospect, § 213.
By the Use of the Processes, § 214.
By Setting Off Other Judgments, § 215.
By Recovering Another Judgment, § 216.
By Lapse of Time, § 217.
By Payment, §§ 218-220.

Review and Prospect.

§ 213. The principal questions that arise in the use of the processes to enforce satisfaction of judgments, from the issuance of the process to its final return, have now been taken up and treated with as much fullness, and as nearly in the order in which they would naturally arise, as our plan of treatment would permit. What remains to be said under the head of satisfaction of judgments may be considered under the following titles: 1, by use of the court's processes; 2, by setting off against other judgments; 3, by recovering another judgment; 4, by lapse of time; 5, by payment. Of these in their order.

By the Use of the Processes.

§ 214. Any satisfaction of the judgment by use of the court's processes without actually realizing the amount is only conditional at most; and this question has been sufficiently considered already.¹ Conceding that arresting the defendant on *ca. sa.* and releasing him, or seizing his property on *fi. fa.* and releasing it, would operate as a satisfaction of the judgment (and there are several decisions denying the last part of the proposition), no such result would follow from surrendering priority in favor of a junior creditor.² Though such action

¹Ante § 120; cases pp. 195-217; *Cooper v. Bigalow*, cases 488.

²*Bank of Pennsylvania v. Winger*, cases 499.

would release a surety, and would entitle a person having an intermediate lien to priority; even these results would not be produced by the court erroneously decreeing priority to the junior creditor, and the senior creditor acquiescing therein.³

By Setting off Against Other Judgments.

§ 215. In the absence of statutes touching the matter, courts have such power over their judgments that they can order one set off against another. When a person desires a judgment in his favor credited on a judgment against him he must apply to the court in which the judgment stands against him, for no other court could enter satisfaction on it. In such cases the court will order satisfaction entered upon condition that satisfaction to an equal amount be entered on the other judgment. The rules as to mutuality of parties are much the same as upon setting off other demands.⁴

By Recovering Another Judgment.

§ 216. That the judgment cannot be used after a judgment has been recovered on it, we have already seen with the reason.⁵ Recovery of judgment against one of several persons jointly and severally liable does not satisfy a judgment previously recovered against another of them. But satisfaction of one of such judgments, in whole or in part, whether it be the largest or the smallest, satisfies all in the same proportion.⁶

By Lapse of Time.

§ 217. At common law, no action could be maintained on a judgment over twenty years old without proving that it

³Hamilton v. Mooney, cases 502.

⁴Cooper v. Bigalow, cases 488; Freeman on Judgments § 467a; Black on Judgments §§ 1000-1005.

⁵See ante § 73.

⁶First National Bank v. Indianapolis P. N. Co., 45 Ind. 5; Knapp v. Roche, 94 N. Y. 329; Sherman v. Brett, 7 Wis. 139.

had not been paid; which might be shown by recent acknowledgements of it, payments on it, etc. A lapse of less time would sustain a finding of payment. In this country, some states have adopted the common law rule by statute; while others have shortened the time, and required the acknowledgements to be in writing.⁷

By Payment.

§ 218. TO WHOM. If the debtor is given no directions to the contrary by the owner of the judgment it is satisfied to the amount paid by a payment to any of the joint creditors;⁸ to the attorney who recovered the judgment;⁹ to an officer having process to collect the judgment not yet returnable, or on which a levy was made before the return day and remains undisposed of;¹ or to the court's clerk while authorized by statute.² And in all of these cases it does not matter that the money so paid is never accounted for to the owner of the judgment. But payment does not satisfy in the absence of express authority to receive it when it is made to an officer who has no process on the judgment, or who has process past due on which no levy has been made,³ or whose process was issued on the order of the party making payment and without authority from the creditor;⁴ nor when made to the clerk while execution is in the hands of the sheriff or before the judgment was rendered;⁵ nor when made to anyone but the real owner of the judgment if he has notified the debtor to pay no one else. For example, the real owner may recover notwithstanding payment to the

⁷Black on Judgments, §§ 992-994; Freeman on Judgments §§ 464-465.

⁸Erwin v. Rutherford, 9 Tenn. (1 Yerger) 169.

⁹McCarver v. Nealey, cases 497.

¹Beard v. Millikan, 68 Ind. 231.

²Bynum v. Barefoot, 75 N. Car. 576.

³Wyer v. Andrews, 13 Me. 168, 29 Am. Dec. 497; Harris v. Ellis, 30 Tex. 4, 94 Am. Dec. 296.

⁴Osgood v. Brown, cases 499.

⁵Governor v. Read, 38 Ala. 252; Hawkeye Ins. Co. v. Luckow, 76 Iowa 21, 39 N. W. 923.

nominal plaintiff;⁶ and a person having a lien on the judgment as attorney or otherwise,⁷ or to whom a part interest in the judgment has been assigned,⁸ may recover notwithstanding a payment to the judgment creditor, provided the debtor has been notified not to make such payment.

§ 219. MEDIUM AND AMOUNT. Neither the attorney⁹ the clerk of the court,¹ nor the officer executing the process² can receive anything other than money in payment, nor give satisfaction for more than the amount actually received,³ unless such action is specially authorized or afterwards ratified by the owner of the judgment. When these agents have received something other than money, either as payment or to be converted into money and applied, it has been held that in doing so they acted as agents for the debtors; and that if they convert into money but do not account for it, it is no payment, and the creditor is entitled to a new execution or to sue over.⁴ Of course, the creditor may bind himself by receiving anything in payment which satisfies him; but the courts are not agreed as to whether he is bound by a satisfaction in full of an absolute judgment in consideration of a payment, in money, of a part of it, by the defendant.⁵

§ 220. WHOSE PAYMENT SATISFIES—ASSIGNMENT AND SUBROGATION. Payment of the amount of the judgment, by a stranger, on executing an assignment of the judgment to the latter, does not satisfy it; and the assignee is entitled to exe-

⁶Triplett v. Scott, 12 Ill. 137.

⁷Andrews v. Morse, cases 224.

⁸Line v. McCall, — Mich. —, 85 N. W. 1089; Railway Co. v. Volkert, 58 Ohio St. 362, 50 N. E. 924; Contra, Burnett v. Crandall, 63 Mo. 410; and see: Hopkins v. Stockdale, 117 Pa. St. 365.

⁹McCarver v. Nealey, cases 497.

¹Aicardi v. Robbins, 41 Ala. 541, 94 Am. Dec. 614.

²Dibble v. Briggs, 28 Ill. 48.

³Jewett v. Wadleigh, 32 Me. 110.

⁴Dibble v. Briggs, 28 Ill. 48; Cooney v. Wade, 23 Tenn. (4 Hump.) 444, 40 Am. Dec. 657; Crutchfield v. Robins, 24 Tenn. 15, 42 Am. Dec. 417; Contra, McCarver v. Nealey, cases 497.

⁵That it is only a discharge *pro tanto*, see: Deland v. Hiatt, 27 Cal. 611, 87 Am. Dec. 102; Weber v. Couch, 134 Mass. 26, 45 Am. Rep. 274. Contra, Harper v. Graham, 20 Ohio 105; Reid v. Hibbard, 6 Wis. 175.

cution.⁶ When a stranger at the request of the debtor advances the amount to pay a judgment with a mutual understanding that the judgment shall be kept alive for his benefit, he is entitled to have it enforced by execution, though no formal assignment was executed. So, when one who has purchased property subject to a judgment lien pays the creditor, with a like understanding, to save the property.⁷ The same privileges have been accorded to sheriffs who have had to pay the amount because they failed to collect it on executions given to them,⁸ to sureties who have paid,⁹ and even to one of the principal debtors who has paid the full amount when the others should have paid in equal proportion. But, by the great weight of authority, the judgment is satisfied as soon as the creditor receives payment from the sheriff, or from one of the debtors, though he be only a surety and the payment be made under the guise of taking an assignment. This is because it would not be safe to make a man a judge of his own rights; but each of these parties is entitled to redress, by action at law for money paid to the use of the real debtor, or by bill in equity for subrogation to the rights of the creditor.¹

⁶*Steele v. Thompson*, cases 218.

⁷*Black on Judgments* § 999; *Freeman on Judgments* § 468.

⁸*Heilig v. Lemley*, cases 489.

⁹*Southeren v. Reed*, cases 494.

¹*Bones v. Aiken*, cases 494, and notes; *Stanley v. Nutter*, cases 186.

C. RIGHTS AFTER SATISFACTION.

Proof and Entry of Satisfaction, § 221.

Appeal After Satisfaction, § 222.

Restitution on Reversal, §§ 223.

Protection of Third Parties when Judgment is Reversed,
§ 224.

Vacating, False Satisfaction, § 225.

Proof and Entry of Satisfaction.

§ 221. As a necessary incident of its power to administer justice, every court has jurisdiction to inquire whether its judgments have been satisfied, and to enter satisfaction on its records whenever a satisfaction in fact is found.² The procedure is to move that satisfaction be entered, give all persons interested notice of the motion, and support it by such proof as the facts afford.³

Appeal After Satisfaction.

§ 222. The courts are not agreed as to whether an appeal may be maintained after the judgment has been satisfied; but the better view seems to be that an appeal lies in favor of a defendant who has paid to avoid execution being issued, or in favor of a plaintiff who has accepted payment of what was awarded him without taking it as payment in full. One who has attempted to enforce a judgment in his favor might with greater reason be held to be precluded from seeking to avoid it.⁴

Restitution on Reversal.

§ 223. On reversal of the judgment after sale on execution under it, or after payment of the amount by the defendant

²Bailey v. Hester, 101 N. Car. 538.

³Abercrombie v. Chandler, cases 184; Black on Judgments § 1014.

⁴Freeman on Judgments § 480a.

to avoid execution. the defendant is entitled to be restored to his original position. He may without demand sue the plaintiff for the amount, or at his option, for the specific property taken if the plaintiff purchased it at the sale. The courts are not agreed as to whether the amount which he can recover is the amount which the property brought at the sale or its real value.⁵

Protection of Third Parties When Judgment is Reversed.

§ 224. A garnishee is protected by payment of the debt or delivery of the property on the judgment against him, although the defendant afterwards obtains a reversal of that judgment or of the judgment in the main action.⁶ When a stranger to a judgment purchases property at a sale under execution thereon his title is unaffected by the subsequent reversal of the judgment, though he knew that an appeal was pending or might be taken.⁷ This rule has been held to extend to one who was interested in the sale as a junior lien-holder,⁸ but not to the attorney for the creditor on whose judgment the sale was made.⁹ If this protection were not allowed, said Lord Coke, "The vendee would lose his term and his money too, and thereupon great inconvenience would follow, that none would buy of the sheriff goods and chattels in such cases, and so execution of judgments (which is the life of the law) would not be done."¹ Some courts have thought that the stranger should be equally protected when he purchases while the appeal is

⁵That the defendant is not restricted to a recovery of the amount for which the property sold, see the following: *Reynolds v. Hosmer*, 45 Cal. 616; *Hays v. Cassell*, 70 Ill. 669; *Fush v. Egan*, 48 La. An. 60; *Maynard v. May* (Ky.), 25 S. W. 879; *Haebler v. Myers*, 132 N. Y. 363, 28 Am. St. 589. *Contra*, *Peck v. McLean*, 36 Minn. 228, 1 Am. St. 665, 30 N. W. 759; *Bryant v. Fairfield*, 51 Me. 149.

⁶*Troyer v. Schweizer*, 15 Minn. 241 (Gil. 187); *Allen v. Seaver*, 38 Vt. 673; *Clough v. Buck*, 6 Neb. 343.

⁷*Gould v. Sternberg*, 128 Ill. 510, 15 Am. St. 138, 21 N. E. 628.

⁸*McBride v. Longworth*, 14 Ohio St. 349, 84 Am. Dec. 383.

⁹*Galpin v. Page*, 85 U. S. (18 Wall.) 350.

¹*Manning's Case*, 8 Coke 94, 97.

pending though the purchaser at the sheriff's sale was the plaintiff or his attorney; but this is generally denied, because the reasons for the rule do not seem to require it.²

Vacating False Satisfaction.

§ 225. The general powers of superior courts give them jurisdiction to set aside satisfactions entered on their judgments; and they will do so whenever justice requires it. But the clerks of these courts possess no such powers.³ Justices of the peace cannot vacate their judgments; and by analogy of reason, would seem to lack power to vacate satisfactions entered on their judgments. The only remedy in such cases would seem to be to sue over on the judgment.⁴ Whether a court should vacate a satisfaction produced by a sale of the property of a stranger or of exempt property is disputed; but the majority of the courts favor setting aside the satisfaction and issuing a new execution in both of these cases, in favor of the plaintiff if he was the purchaser at the sale, for the use of the purchaser if he was a stranger.⁵ A few courts have set aside satisfactions and issued new executions because the property was encumbered for more than it was worth; but it is generally held that the satisfaction cannot be set aside because the purchaser was mistaken as to the quality of the property or the value of the defendant's estate in it." And it is quite generally agreed that no action can be maintained by the purchaser against the sheriff or the plaintiff for the money paid, nor against the defendant for the loss from an excessive bid. There is no warranty at such sales. *Caveat emptor* applies.⁷

²*Singly v. Warren*, 18 Wash. 434, 63 Am. St. Rep. 896, 51 Pac. 1066.

³*Hughes v. Streeter*, cases 506.

⁴*Piper v. Elwood*, cases 505, and notes.

⁵*Watson v. Reissig*, cases 509; *Freeman v. Caldwell*, cases 510, and notes.

⁶*Poppleton v. Bryan*, 36 Ore. 69, 58 Pac. 767. But as to sales by a court of equity see: *People's Bank v. Bramlett*, 58 S. Car. 477, 36 S. E. 912, 79 Am. St. 855.

⁷See notes to *Freeman v. Caldwell*, cases 512.



CASES.

OUR PLAN OF TREATMENT.

1. NATURE AND ESSENTIALS OF JUDGMENTS.
2. KINDS OF JUDGMENTS.
3. THE RECORD OF THE JUDGMENT.
4. AMENDING, VACATING, AND MODIFYING JUDGMENTS.
5. THE EFFECT OF JUDGMENTS.
6. THE SATISFACTION OF JUDGMENTS.
 - A. The Processes to Obtain Satisfaction.
 - a. Nature.*
 - b Issuance.*
 - c. Execution.*
 - B. What Constitutes Satisfaction.
 - C. Questions Arising after Satisfaction.

I. NATURE AND ESSENTIALS OF JUDGMENTS.

1. DEFINITION AND NATURE OF JUDGMENTS.

JASPER v. SCHLESSINGER and MAYER.

22 Illinois Appeals 637. (1886)

Judgment—Record—Presumption of Verity—Session of Court—Execution.

Motion in the Superior Court of Cook county by Peter H. Jasper to amend the record of judgment rendered against him and to quash the execution issued thereon. From an order denying the motion he brings error. Affirmed.

Grant & Brady, and F. F. Leffingwell for Jasper.

Kraus, Mayer & Brackett, for respondents.

The Court by Moran, J. On the 17th day of June, 1886, a judgment by confession was entered in the Superior Court of Cook county by defendants in error against the plaintiffs in error upon a certain note and warrant of attorney substantially in the usual form. On June 26th thereafter a motion was made by the plaintiffs in error in the said court to correct the record of the said judgment so as to show that the branch of the said court, presided over by Hon. Elliott Anthony, who directed the entry of the judgment, did not open on the 17th day of June, 1886, and said judge did not take his seat on the bench till 10 o'clock in the forenoon of said day, and that the direction to enter the judgment was indorsed by said judge upon the declaration filed in said case, to which was attached the cognovit note and warrant of attorney, and that such indorsement was made before the hour of 10 o'clock in the forenoon of said 17th day of June and outside of the court room which was at that date occupied and used by said judge. Affidavits were filed in support of said motion, from which it appears that the declaration, cognovit, etc., with the order to enter judgment thereon, was

handed to a recording clerk about 10 o'clock and that the judgment order was written by him in the judgment record book by fifteen minutes past ten, and that prior to the recording of judgment an execution had been issued and delivered to the plaintiffs' attorneys in said case. That on said 17th day of June the branch of said court presided over by Judge Anthony, "was opened and said judge ascended the bench on that morning at 10 o'clock and not before." There was evidence tending to show that the declaration, cognovit, and other papers, with the indorsement, "enter judgment, E. Anthony, Judge, etc.," were filed in the office of the clerk of the Superior Court about 9:30 o'clock on the morning of said 17th day of June. The court refused to change the record as required by the motion and such refusal of the court is assigned for error.

The record of the judgment as it comes here, shows that the [*639] June term of the court was duly opened on the first Monday, being the 7th day of June, A. D. 1886; that on the 17th day of June, 1886, the declaration note, warrant of attorney and cognovit were filed in the clerk's office of the Superior Court with the words, "enter judgment, E. Anthony, Judge, etc.," indorsed thereon, and then follows the judgment by the court, "on consideration that the plaintiffs do have and recover, etc.," in all respects a formal judgment order. It is to be observed that there is no order of adjournment at all in the record; and as appears, the court being opened on June 7th, continued open without any adjournment whatever down to and including the day on which the judgment was entered. Even if the ordinary recess or adjournment of the court over night could be held a suspension of the functions of the court until there should be a proclamation of the opening of the court the next morning, there is nothing in the record to show that there was any such temporary adjournment.

There was no offer by plaintiffs in error in their motion to change the record, to show that the court had adjourned at any time prior to the morning of June 17th, and no evidence contained in the affidavits filed in support of such motion, that there had in fact been any such adjournment. The statement that the branch of said court "was opened and said judge ascended the bench on that morning at 10 o'clock and not before," may give rise to an

inference that the court had been adjourned, but it is very far from a statement to that effect, and the inference can not be indulged in, particularly in the face of the record itself. The rule of law is that the court is open from the first convening at the commencement of the term as fixed by law till it is closed by the expiration of the term or adjourned *sine die*, and the term, though running through several weeks, and even months, is to be regarded as one day. *Richardson v. Beldam*, 18 Ill. App. 527; *Union Pacific R. R. Co. v. Hand*, 7 Kan. 380, *Barnett v. State*, 1 Wis. 156, *176.

The decision in *Conkling v. Ridgeley*, 112 Ill. 36, that the period of definite adjournment for several weeks during the term will, under our statute, be vacation for the purpose of [*640] authorizing the clerk to enter up confessions of judgment, does not conflict with the general rule which has always obtained at common law.

The statement in the motion, that the indorsement to enter judgment was made outside the court room, which was at that date occupied and used by said judge, is wholly unsupported by the evidence. There is absolutely no showing whatever as to where the indorsement was made, and the record showing the court open and reciting the formal order of judgment, it must be presumed that the order was made at the place where, by law, the court was authorized to be held.

There was no error, then, in the refusal of the court to alter or amend the record in the manner suggested in the motion of the plaintiff in error. Neither was there error in overruling the motion subsequently made to vacate the judgment on the ground that its entry was not based upon any order or judgment of a judge of said court, made or found in open court. As we have seen in the discussion of the prior motion, the court was open, and the record shows a proper order of judgment by the court. This record imports verity, and until altered by a proceeding apt and proper for the purpose, it can not be contradicted.

A further motion was made to quash the execution, on the ground that at the time it was issued by the clerk and delivered to the attorneys there was no judgment entered; *i. e.*, the record

of the judgment had not been made up in the record of the court by the clerk.

The papers in the case became a part of the record when filed and the order of the court to enter judgment was a sufficient minute to guide the clerk in writing out a formal order of judgment. It is not the practice of the court in rendering judgment in any case at common law to write out the formal order at length, nor is it the practice for the minute clerk to write out such order in his minutes, but such memorandum is made as clearly indicates what the judgment of the court is.

We have no judgment roll in which all the pleadings and each order is formally and with great particularity written out as [*641] was the ancient practice in England. "Judgment for the plaintiff for \$100," is a skeleton entry which, if made by the judge or entered on the minutes of the clerk by the judge's order, will sufficiently indicate the formal entry that is to be made in the record of the court. The words, "enter judgment," written by the judge upon the papers in a confession proceeding that have been submitted to the court for inspection and judgment, indicate very clearly, in our opinion, that the court has considered the matter and intends by those words to render a judgment for the amount confessed in the cognovit, and that such minute or memorandum fully authorizes the spreading on the record by the clerk of the full and formal judgment order. We find in the record, as it is brought here, the judgment order rendered on the 17th day of June.

This is not like the case cited by counsel where, when the full record was certified by the clerk, no judgment appeared to have ever been rendered. When the complete record is inspected on error the formal entries are required to be set out in it. In England in practice the proceedings are seldom entered on the judgment roll unless it is absolutely necessary to do so for the purpose of bringing error or for the purpose of evidence. *Smith's Action at Law*, 192. A reviewing court may not interpret the court's minutes or memorandum or expand them into formal and complete orders, but when the court itself does so during the term and the record shows them duly entered, the recital thereof is conclusive.

In vacation, where a confession of judgment is entered by the clerk, the judgment order as held in *Ling v. King*, 91 Ill. 571, must be entered before any judgment can be held to be in existence. The judgment and the record evidence of it is in that case the same thing, but in term time a judgment may be rendered by the court at the beginning of the term and the full record of the order may not be written up till after the expiration of the term. It could not be said that there was no judgment because the judgment order had not been spread out at length upon the judgment record. The judgment is a fact from the moment it is pronounced by the court, and the [*642] clerk's duty is to record such judgment before the final adjournment of the term "or as soon thereafter as practicable." R. S., Chap. 25, § 14.

We see no reason for making a distinction between a judgment rendered by the court in term time on confession and a judgment in a suit where there has been an issue and a contest. When the judgment has been rendered in the one case it will authorize the issuing of an execution as fully as in the other and each will be a lien on the real estate of the person against whom it is obtained "from the time the same is rendered."

It is not, however, necessary for us to decide in this case the question as to whether the execution may issue before the judgment is written up in the judgment record. If there was an absolute requirement of the statute that the judgment order should be recorded by the clerk before execution should issue, yet the record being written on the same day but after the execution issued, the irregularity would not avail the defendant on the facts appearing in the record. By the statute in New York, "no judgment shall be deemed valid so as to authorize any proceedings thereon until the record thereof shall have been signed and filed." In *Small v. McChesney*, 3 Cow. 19, upon a motion to set aside the execution, it was shown that the execution was issued and levied between 2 and 4 o'clock in the morning, whereas the judgment was not signed till about 11 o'clock of the same morning and the record was not filed till 4 P. M. of the same day. The court said: "The party who moves has sustained no injury by this proceeding. The whole proceeding is on the same day, which the law will not divide into frac-

tions unless this be necessary for the purpose of guarding against injustice. Here has been none. The objection is merely technical and the technical answer is enough when there has been no injury from the proceeding."

To the same effect are *Clute v. Clute*, 4 Den. 241, and 3 Den. 263. There is no pretense here that the judgment was not for a debt *bona fide* due, that it was not for the correct amount, or that the execution was obtained or issued for any unlawful purpose. The motion was based at the very best on a mere [*643] technicality and was upon the authority of the cases cited properly overruled.

The plaintiffs in error also moved the court to set aside wholly, or in part, the cognovit filed, for the reason that the attorney who signed the same exceeded the authority conferred by the warrant of attorney. The cognovit agreed that no writ of error or appeal should be prosecuted from the judgment entered nor any bill in equity filed to interfere with the operation of the judgment. The warrant of attorney did not authorize such agreement, but only gave power "to waive and release all errors which may intervene in any such proceedings." This motion the court might well have granted and expunged from the cognovit the unauthorized portion without in any manner affecting the validity of the judgment. But the refusal of the court to do so is not such error as will reverse.

The unauthorized agreement could not be made effectual against plaintiffs in error unless affirmatively ratified by them. The prosecution of this writ of error evidences the fact that the agreement is futile to deprive them of their rights. That error only which injures is available to cause a reversal.

The judgment of the Superior Court will be affirmed.

Judgment affirmed.

BRIGHTMAN & CO. v. MERRIWETHER et al.

121 Alabama 602, 25 Southern 994. (1898)

The Court by McClellan, C. J. Trial of right to property which had been levied on at the suit of Merriwether et al. against Brandy, and claimed by Brightman & Co. under [*603] a mortgage executed to them by Brandy. The burden was on the plaintiffs to show the levy of a valid execution on the property. *Jackson*

v. *Bain*, 74 Ala .328. This they failed to do. To the contrary it affirmatively appeared by the transcript of the record in the case of *Merriwether et al. v. Brandy*, the execution upon a supposed judgment in which was levied on this property, that no judgment was ever entered therein. What is claimed to be a judgment is the mere copy of the judge's bench notes, stating the parties to the case, and the following: "August 18, Judgment by default, writ of enquiry, damages assessed at \$77.65, waiver of Ex. as to personality." This, of course, was no judgment. * * *

Reversed and remanded.

LOCKE v. HUBBARD.

9 South Dakota 364, 69 N. W. 588. (1896)

How Early Execution may Issue—On Order for Judgment—Effect of Judge's Signature—Importance of Filing Record and Docketing Judgment—Judgment Defined.

Action by C. W. Locke against C. W. Hubbard, sheriff of Minnehaha county, for conversion of a stock of drugs. Defendant appeals from a judgment in favor of plaintiff and from an order denying a motion for a new trial. Reversed.

The plaintiff claimed under a chattel mortgage by B. L. Havdahl and another. The defendant justified the seizure under an execution on a judgment against B. L. Havdahl, in favor of Noyes Bros. & Cutler. The important question arises on the ruling of the court excluding the judgment and execution from evidence, because no judgment had been entered in the judgment book at the time the execution issued.

Davis, Lyon & Gates, for Appellant.

Joe Kerby, for Appellee.

The Court by Corson, P. J. * * * It is contended by the learned counsel for the appellant that the judgment, when reduced to writing, and signed by the judge, was the final determination of the action, and execution issued thereon was a valid execution, though no judgment had been, in fact, entered in the judgment book, and that the court, therefore, erred in excluding the judgment roll and execution. The learned counsel for the respondent contends that the paper signed by the judge was, in legal effect, simply an order for judgment, and that there can be in this state

no legal judgment until one is entered in the judgment book, which will authorize the issuance of an execution, the filing of a judgment roll, or the docketing of the judgment. This is an important question in this state, and has never yet been passed upon by the appellate court. A judgment is defined by § 5024, Comp. Laws, as follows: "A judgment is the final determination of the rights of the parties in the action." It will be observed that what constitutes the evidence of such judgment, or when or how such determination of the rights of the parties shall become effectual as a judgment, is left unprovided for by that section. It defines a judgment in the language of most of the text-books upon this subject. Section 5095 provides that "judgment upon an issue of law or fact * * * may be entered by the clerk upon the order of the court or the judge thereof." Section 5101 provides that "the clerk shall keep, among the records of the court, a book, for the entry of the judgments, to be called the 'judgment book.'" Section 5102 provides: "The judgment shall be entered in the judgment book, and shall specify clearly the relief granted or other determination of the [368] action." It will be noticed that no judgment is mentioned which is to be copied or entered in the judgment book, but that the judgment shall be entered by the clerk in the judgment book. Section 5103 provides that, "immediately after entering the judgment," a judgment roll shall be made up, and what it shall contain. Section 5104 provides that, "on filing the judgment roll," the judgment shall be docketed, etc. And § 5110 provides that "the party in whose favor judgment has heretofore been or shall hereafter be given * * * may, at any time within five years after the entry of judgment, proceed to enforce the same by execution." Section 5111 provides: "After the lapse of five years from the entry of judgment, "application can be made to the court," etc. It will thus be seen that the judgment entered in the judgment book is the only judgment mentioned in the statute. What authority, therefore, has this court to hold any paper or record a judgment other than the one entered in the "judgment book?" The judgment there entered is the original judgment, and the only one the law contemplates. Undoubtedly the court, judge, or counsel may very properly prepare a form of

judgment for the clerk to enter, but such paper, though signed by the judge or court, is no more the judgment of the court than the one prepared by counsel. It may be, and probably would be held, an order for judgment. If these views are correct, then it follows that the execution was issued before the entry of any judgment upon which it could be based, and before the clerk was authorized to issue it, as he is only authorized to issue the execution at any time within five years after the entry of the judgment but not before such entry.

The counsel for the appellant have cited a large number of authorities, including both text writers and courts, in support of their contention that the judgment prepared and signed by the judge is the judgment of the court; but the statutory provisions on this subject are so various that these decisions throw but little light upon the question, under the peculiar [369] provisions of our statute. The statutes of Minnesota upon the subjects of judgments are very nearly, if not identically, the same as those in this state, and that court has uniformly held that there is no judgment in that state, other than the one entered in the "judgment book." In *Rockwood v. Davenport*, 37 Minn. 533, 35 N. W. 377, that court, by *Gilfillan, C. J.*, says: "Gen. St. 1878, Chap. 66, § 273, (Gen. St. 1894, § 5421) reads: 'The judgment shall be entered in the judgment book, and specify clearly the relief granted, or other determination of the action.' By § 275 (§ 5423) the clerk is required, '*immediately after entering the judgment,*' to attach and file, as the judgment roll, certain papers, among them a copy of the judgment. Sec. 277 (§ 5425) provides for docketing the judgment '*on filing the judgment roll.*' These acts follow in regular sequence. 1st, the entry of the judgment, 2nd, the making up and filing the judgment roll, 3rd, the docketing. To support either a judgment roll or docketing, there must be a judgment entered. As this court said in *Williams v. McCrude*, 13 Minn. 46 (Gil. 39): 'If a copy of the judgment constitutes a part of the judgment roll, the original must exist.' There can be no judgment capable of being docketed or enforced in any manner till it is entered in the judgment book. Until that is done it does not matter that the party is entitled to judgment either by default of defendant, or upon a

decision or direction of the court. It has frequently been decided that an order or direction for judgment by the court, or by a referee, is not a judgment so that an appeal can be taken from it. That, to constitute a judgment, it must be entered in the judgment book, as the statute directs, has always been held by this court. *Brown v. Hathaway*, 10 Minn., 303 (Gil. 238); *Williams v. McCrude*, 13 Min. 46 (Gil. 39); *Washburn v. Sharpe*, 15 Min. 63, (Gil. 43); *Hodgins v. Heaney*, 15 Min. 185 (Gil. 142); *Thompson v. Bickford*, 19 Min. 17 (Gil. 1); *Hunter v. Stove Co.*, 31 Min. 505, 18 N. W. 645." The supreme court of North Dakota, construing the same provisions of the Code of Civil Procedure now [370] under consideration, in a very exhaustive opinion, takes the same view. Mr. Justice *Bartholomew* dissented, but upon other points decided by the majority of the court. *In re Weber* (N.D.), 59 N. W. 523. We find no authority for holding a different view upon statutes containing similar provisions, and hence upon the weight of authority, as well as upon our own view of these provisions, we hold that a judgment, within the meaning of our Code, is a judgment entered in the judgment book; and, until one is entered therein, there is no judgment upon which an execution can be legally issued by the clerk.

It is further contended that such a holding has the effect of giving authority to the clerk, and not the court, to enter the judgment. But this is not so, for the reason that, in contemplation of law the court enters the judgment in the judgment book, through its clerk, who merely performs the clerical act of writing the judgment in the judgment book, under the direction of the court.

It is further contended by appellant that the practice in this state has been to regard the judgment, signed by the court and filed, as the judgment in the case, and that a decision at this time will unsettle titles to property sold upon execution. While a court, in making its decision, cannot look to consequences beyond the case before it, we apprehend no such result as counsel suggest would follow, for the reason that evidence *aliunde* the record could not properly be admitted in a collateral proceeding, if objected to on the trial, and the presumption that the clerk had performed his

duty would prevail, unless otherwise clearly shown by the record.

* * * [375]

Upon the evidence before the trial court as disclosed by the record in this court, the plaintiff was not entitled to a judgment in excess of \$94.24, in any event; and hence the court erred in directing a verdict in excess of that sum, for which a new trial must be granted. The judgment of the county court and the order denying a new trial are

Reversed, and a new trial ordered.

2. JURISDICTION.

HOAGLAND v. CREED.

81 Illinois 506. (1876)

Jurisdiction by Consent—Validity of Judgment.

Error to Morgan Circuit Court. Dismissed.

Oscar A. DeLeww, for appellant.

Morrison, Whitlock & Lippincott, for appellee.

The Court by Scholfeld, J. The record brought before us by this writ shows a trial, by agreement, before Edward P. Kirby, Esq., a member of the bar, and what purports to be a judgment rendered by him as judge of the circuit court of Morgan county. The bill of exceptions, or rather what purports to be the bill of exceptions, is signed by him; and it is impossible for us to close our eyes to the fact, however strongly we might be inclined to do so, that the record sought to be reviewed is one made by Edward P. Kirby, Esq., a member of the bar, and not by any one commissioned to act as circuit judge. What we might hold, did it appear that he was acting as circuit judge under color and claim of authority, we will not say—it is sufficient that all pretense that he was a judge *de facto* is without any foundation in the record. It expressly shows that he is a member of the bar, and that his authority for assuming to act as judge was the agreement of the parties. Freeman on Judgments, § 148; *Case v. State*, 5 Ind. 1; *State v. Anone*, 2 Nott & McCord, (S. Car.) 27; *State v. Alling*, 12 Ohio 16; *Blackburn v. State*, 40 Tenn (3 Head) 690; and *Pepin v. Lackenmeyer*, 45 N. Y. 27, cited by the counsel for the defendant in error, are, therefore, not in point.

Under our constitution, judges are elected by popular vote, except to fill vacancies not to exceed one year, which shall be filled by the appointment of the Governor. Const. 1870, art. 6, § 32. And all judges shall be commissioned by the Governor. Same article, § 29. And, unlike the constitutions of some other States, it contains no authority for temporarily filling the office in any other way.

With regard to the doctrine that consent can not confer jurisdiction as to the subject matter, and that judicial power can not be delegated, we deem it unnecessary to enter into any extended discussion. All that need be said on these subjects is [*508] so well said by Judge Cooley, in his work on Constitutional Limitations, 1st ed. p. 399, that we shall content ourselves with transcribing it: "But the courts of a country can not have those controversies referred to them by the parties which the law-making power has seen fit to exclude from their cognizance. If the judges should sit to hear such controversies, they would not sit as a court; at the most, they would be arbitrators only, and their action could not be sustained on that theory, unless it appeared that the parties had designed to make the judges their arbitrators, instead of expecting from them valid judicial action as an organized court. Even then, the judgment could not be binding as a judgment, but only as an award; and a mere neglect by either party to object to the want of jurisdiction, could not make the decision binding upon him, either as a judgment or as an award. * * *

"If the parties can not confer jurisdiction upon a court by consent, neither can they by consent empower any individual other than the judge of the court to exercise its powers. Judges are chosen in such manner as shall be provided by law; and a stipulation by parties that any other person than the judge shall exercise his functions in their case would be nugatory, even though the judge should vacate his seat for the purpose of the hearing."

That which, in the present record, purports to be a bill of exceptions and judgment is, therefore, a nullity, and there is no case before us upon which we are authorized to render final judgment. It follows, the writ of error must be dismissed.

Writ dismissed.

COOPER v. REYNOLDS.

77 United States (10 Wallace) 308. (1870)

Attachment—Elements of Jurisdiction—Effect of Irregularities—Effect of Personal Service—Collateral Attack.

Ejectment by Reynolds against Cooper in the circuit court for the eastern district of Tennessee. From judgment for plaintiff, defendant brings error. Reversed.

On the trial it was admitted that Reynolds owned the land unless Cooper had acquired title by virtue of the following described judicial proceedings. The record in the case of Brownlow v. Reynolds in the circuit court for Knox county, Tennessee, which was put in evidence by Cooper, showed that on Sept. 26th, 1863, G. W. Brownlow sued out of that court a summons in trespass against said Reynolds and others for false imprisonment, etc.: damages, \$25,000. To this writ the sheriff returned that "he had made search and that none of the defendants were to be found in his county." The day the writ was issued Brownlow filed with the clerk of the court an affidavit for attachment against the property of said Reynolds and the others; alleging, among other things, "that all of the defendants have *fled from this state or that they so abscond or conceal* themselves that the ordinary process of law cannot reach them." In the record is also an attachment bond for \$50,000, and an attachment for \$25,000, all bearing the same date. The attachment recites the substance of the affidavit, and directs the sheriff to attach sufficient of the property of Reynolds and the others to satisfy the said demand of \$25,000, and hold the same ready to be disposed of as the court should direct. To this attachment the sheriff returned that he had thereon attached all the title and right of Reynolds in 160 acres of land, the property now in controversy, describing it. The court ordered publication to be made in the Knoxville Whig, a county paper, notifying the defendants to appear and plead, answer or demur, or the suit would be taken as confessed as to them and proceeded in *ex parte*. The record does not show that this publication was ever in fact made, except inferentially by setting out the order for publication, which was entitled, "Order for publication and *the publication as made in the Knoxville Whig.*" The record goes on to say that the

defendants, being solemnly called to come into court, came not, but made default, and it appearing that the attachment has been duly levied, *and that publication has been made according to law*, it is ordered that the plaintiff do recover his damages. These were assessed at \$25,000, and for that sum execution was ordered to issue, and that the sheriff should sell the attached land. The land was accordingly sold by the sheriff under a *venditioni exponas*, and deed made to Cooper, as purchaser, who was put into possession under a *haberi facias*, issued from the same court in the same proceeding.

The record being thus in evidence the court instructed the jury that the sheriff's deed was null and void, and conveyed no title, because the judgment on which the sale was made was void for want of either personal service on or appearance by the defendants therein, or a valid attachment; and that the attachment was void because it does not appear that publication was ever in fact made, and because the affidavit did not conform to the law. Verdict being found for the plaintiff under the instructions of the court, defendant alleges as error that the instructions were not correct.

Horace Maynard and *T. A. R. Nelson* for plaintiff in error.

J. W. Moore, for defendant in error.

The Court by Miller, J. The objections taken to the proceeding in attachment under which Cooper, the defendant below, claimed title, are, 1st, that by the law of Tennessee the attachment could not be issued, at the beginning of the suit where the action was *ex delicto*, but could only be issued after suit commenced; 2d, that the affidavit was defective; 3d, that there was no publication of notice, as required by the statutes.

The question of the conformity of these proceedings to the requirements of the statutes under which they were had, has been very fully discussed by counsel, and if we were sitting here as on a writ of error to the judgment of the state court under which the land was sold, we might not find it easy to affirm or reverse the judgment on satisfactory grounds, notwithstanding the abundant citation of authorities from the Tennessee courts. But we occupy no such position. The record of this case is introduced collaterally as evidence of [*316] title in another suit, between other parties,

and before a court which has no jurisdiction to reverse or set aside that judgment, however erroneous it may be. Nor can it disregard that judgment, or refuse to give it effect, on any other ground than a want of jurisdiction in the court which rendered it.

It is of no avail, therefore, to show that there are errors in that record, unless they be such as prove that the court had no jurisdiction of the case, or that the judgment rendered was beyond its power. This principle has been often held by this court, and by all courts, and it takes rank as an axiom of the law. But that its applicability to the present case may be thoroughly understood, reference is made to the most important of the decided cases in this court and in the Supreme Court of Tennessee.¹

It is necessary, therefore, in the present case to inquire whether the errors alleged affect the jurisdiction of the court.

It is as easy to give a general and comprehensive definition of the word jurisdiction as it is difficult to determine, in special cases, the precise conditions on which the right to exercise it depends. This right has reference to the power of the court over the parties, over the subject-matter, over the *res* or property in contest, and to the authority of the court to render the judgment or decree which it assumes to make.

By jurisdiction over the subject-matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred. Jurisdiction of the person is obtained by the service of [*317] process, or by the voluntary appearance of the party in the progress of the cause. Jurisdiction of the *res* is obtained by a seizure under process of the court, whereby it is held to abide such order as the court may make concerning it. The power to render the decree or judgment which the court may undertake in the particular cause, depends upon the nature and extent of the authority vested in it by law in regard to the subject-matter of the cause.

It is to be observed that in reference to jurisdiction of the per-

¹Harvey v. Tyler, 2 Wall. 328, and cases there cited; McGavock v. Bell, 43 Tenn. (3 Cold.) 512; Stevenson v. McLean, 24 Tenn. (5 Hump.) 332, and cases cited.

son, the statutes of the States have provided for several kinds of service of original process short of actual service on the party to be brought before the court, and the nature and effect of this service, and the purpose which it answers, depend altogether upon the effect given to it by the statute. So also while the general rule in regard to jurisdiction *in rem* requires the actual seizure and possession of the *res* by the officer of the court, such jurisdiction may be acquired by acts which are of equivalent import, and which stand for and represent the dominion of the court over the thing, and in effect subject it to the control of the court. Among this latter class is the levy of a writ of attachment or seizure of real estate, which being incapable of removal, and lying within the territorial jurisdiction of the court, is for all practical purposes brought under the jurisdiction of the court by the officer's levy of the writ and return of that fact to the court. So the writ of garnishment or attachment, or other form of service, on a party holding a fund which becomes the subject of litigation, brings that fund under the jurisdiction of the court, though the money may remain in the actual custody of one not an officer of the court.

When we come to the application of these principles to the case before us, that which leads to some embarrassment is the complex character of the proceeding which we are to consider.

Its essential purpose or nature is to establish, by the judgment of the court, a demand or claim against the defendant, [*318] and to subject his property, lying within the territorial jurisdiction of the court, to the payment of that demand.

But the plaintiff is met at the commencement of his proceedings by the fact that the defendant is not within that territorial jurisdiction, and cannot be served with any process by which he can be brought personally within the power of the court. For this difficulty the statute has provided a remedy. It says that, upon affidavit being made of that fact, a writ of attachment may be issued, and levied on any of the defendant's property, and a publication may be made warning him to appear, and that thereafter the court may proceed in the case, whether he appears or not.

If the defendant appears the cause becomes mainly a suit *in personam*, with the added incident, that the property attached remains liable, under the control of the court, to answer to any

demand which may be established against the defendant by the final judgment of the court. But, if there is no appearance of the defendant, and no service of process on him, the case becomes, in its essential nature, a proceeding *in rem*, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff.

That such is the nature of this proceeding in this latter class of cases, is clearly evinced by two well-established propositions: first, the judgment of the court, though in form a personal judgment against the defendant, has no effect beyond the property attached in that suit. No general execution can be issued for any balance unpaid after the attached property is exhausted. No suit can be maintained on such a judgment in the same court or in any other, nor can it be used as evidence in any other proceeding not affecting the attached property, nor could the costs in that proceeding be collected of defendant out of any other property than that attached in the suit. Second, the court, in such a suit, cannot proceed unless the officer finds some property of defendant on which to levy the writ of attachment. A return, that none can be found, is the end of the case, and deprives the court of further jurisdiction, [*319] though the publication may have been duly made and proven in court.

Now, in this class of cases, on what does the jurisdiction of the court depend? It seems to us that the seizure of the property, or that which, in this case, is the same in effect, the levy of the writ of attachment on it, is the one essential requisite to jurisdiction, as it unquestionably is in proceedings purely *in rem*. Without this the court can proceed no further; with it the court can proceed to subject that property to the demand of plaintiff. If the writ of attachment is the lawful writ of the court, issued in proper form under the seal of the court, and if it is by the proper officer levied upon property liable to the attachment, when such a writ is returned into court, the power of the court over the *res* is established. The affidavit is the preliminary to issuing the writ. It may be a defective affidavit, or possibly the officer whose duty it is to issue the writ may have failed in some manner to observe all the requisite formalities; but the writ being issued and levied, the affidavit has

served its purpose, and, though a revisory court might see in some such departure from the strict direction of the statute sufficient error to reverse the judgment, we are unable to see how that can deprive the court of the jurisdiction acquired by the writ levied upon defendant's property.

So also of the publication of notice. It is the duty of the court to order such publication, and to see that it has been properly made, and, undoubtedly, if there has been no such publication, a court of errors might reverse the judgment.

But when the writ has been issued, the property seized, and that property been condemned and sold, we cannot hold that the court had no jurisdiction for want of a sufficient publication of notice.

We do not deny that there are cases which, not partaking of the nature of proceedings *in rem*, when the judgment is to have an effect on personal rights, as in divorce suits, or in proceedings to compel conveyance, or other personal acts, in which the legislature has properly made the jurisdiction to depend on this publication of notice, or on bringing the [*320] suit to the notice of the party in some other mode, when he is not within the territorial jurisdiction.

It is not denied that the court had authority to issue writs of attachment against the property of persons absconding the state, and that such writs could issue in actions for torts. The court has a general jurisdiction as to torts, and attachment is one of its remedial agencies in such cases. Whether the writ should have been issued simultaneously with the institution of the suit, or at some other stage of its progress, cannot be a question of jurisdiction. If it is, any other error which affected a party's rights, could as well be held to affect the jurisdiction.

Such departures from the rules which should guide the court in the conduct of a cause are not errors which render its action void.

The case of *Voorhees v. The Bank of the United States*, 10 Peters 449, was much like this, and required stronger presumptions in favor of the jurisdiction of the court to sustain its acts than the one before us.

The defendant there, as here, held land under attachment proceedings against a non-resident who had never been served with process or appeared in the case. No affidavit was produced, nor publication of notice, nor appraisal of the property, but it was condemned and sold without waiting twelve months from the return of the writ, and without calling him at three different terms of the court, all of which are specially required by the act regulating the proceedings in Ohio, where they were had. This court held that there was sufficient evidence of jurisdiction in the court which rendered the judgment, notwithstanding the defects which we have mentioned, and that they were not fatal in a collateral proceeding.

In the present case there is a sufficient writ of attachment, its levy and return, the judgment of the court, on trial by jury, the order to sell the property, the sale under the *venditioni exponas*, the writ of possession, sheriff's deed and [*321] actual delivery of possession under order of the court. To hold them void is to overturn the uniform course of decisions in this court, to unsettle titles to vast amounts of property, long held in reliance on those decisions, and, in our judgment, would be to sacrifice sound principle to barren technicalities; and, after a careful examination of the reported cases on this subject, we believe this to be the law, as held by the courts of Tennessee.

Judgment reversed, and a new trial ordered.

Field, J., dissenting. I dissent from the judgment in this case. I am of opinion that the state court of Tennessee never acquired jurisdiction in the cause of *Brownlow v. Reynolds*.

HUNT v. HUNT.

72 New York 217, 28 Am. Rep. 129. (1878)

Divorce Suit—Jurisdiction—Residence—Collateral Attack.

Samuel Hand, for appellant.

G. Tillotson, for respondent.

The Court by Folger, J. This is a suit in equity, brought by the plaintiff against the defendant, for a divorce *a vinculo matrimonii*. She alleges that she is now his wife. She bases her right to a dissolution of the marriage on an allegation of adultery committed by him. That the plaintiff and defendant were once mar-

ried is admitted. It is also conceded, that since the marriage the defendant has formed a matrimonial alliance in fact, with another woman than the plaintiff. * * * The justification set up by him in this suit is, that prior to the commencement of it, and prior to that matrimonial alliance in fact, he had obtained a judgment against the plaintiff of a dissolution of the relation of marriage once existing between them, whereby he was set at liberty to marry again. * * * It is claimed by the plaintiff that that judgment was got by fraud upon her and upon the court, and that it is void for want of jurisdiction in the court which assumed to render it, in that the court had neither jurisdiction of the subject-matter nor of the party defendant.

We do not think that the allegation of fraud is maintained. * * * We come now to consider the question of the jurisdiction of the court. * * * Power given by law to a court, to adjudge divorces from the ties of matrimony, does give jurisdiction of the subject-matter of divorce. Though the proceedings before that court, from first to last of the testimony, in an application for divorce, should show that a state of facts does not exist which makes a legal cause for divorce, yet it cannot be said that the court has not jurisdiction of the subject-matter; that it has not power to entertain the proceeding, to hear the proofs and allegations, and to determine upon their sufficiency and legal effect. * * * Jurisdiction of the subject-matter is power to adjudge concerning the general question involved, and is not dependent upon the state of facts which may appear in a particular case, arising, or which is claimed to have arisen, under that general question. One court has jurisdiction in criminal cases; another in civil cases; each in its sphere has jurisdiction of the subject-matter. Yet the facts, the acts of the party proceeded against, may be the same in a civil case as in a criminal case,—as, for instance, in a civil action for false and fraudulent representations and deceit, and in a criminal action for obtaining property by false pretenses. We should not say that the court of civil powers had jurisdiction of the criminal action, nor *vice versa*, though each had power to pass upon allegations of the same facts. So that there is a more general meaning of the phrase “subject matter,” in this connection, than power to

act upon a particular state of facts. It is the power to act upon the general, and, so to speak, the abstract question, and to determine and adjudge whether the particular facts presented call for the exercise of the abstract power. A suitor for a judgment of divorce may come into any court of the state in which he is domiciled, which is empowered to entertain a suit therefor, and to give judgment between husband and wife of a dissolution of their married state. If he does not establish a cause for divorce, jurisdiction to pronounce judgment does not leave the court. * * * The court which rendered this judgment had lawful jurisdiction of the subject-matter of divorce. The plaintiff, however, makes the point against the validity of the judgment that it was void in Louisiana, as wholly unauthorized by, and in conflict with, the constitution of the state. And here it is, that it is of import to know what is meant by the term "jurisdiction of the subject-matter." If it means no more than power to act when, and not till when, a state of facts is proven which exactly squares with the grounds for divorce prescribed and established by constitutional and valid statutes, then we must inquire what the constitution of a state permits in the way of statutory regulation, and whether the proofs in any case show that the court which in that case adjudged a divorce had sufficient evidence before it to enable it to give judgment. In effect, we must review the judgment upon the law and the facts. If the term means what we have above pointed out that it does mean, then we are to give credit to the judgment of a court which, having power to act upon the general subject of divorce, has heard the cause, and has proceeded to judgment. * * * [Here the court discussed the sufficiency of substituted service to obtain jurisdiction of the person in divorce proceedings, and held the service good.]

It, therefore, appears that as the judgment of divorce, set up by the defendant, was rendered by a court having jurisdiction of the subject-matter, and of the persons of the plaintiff and defendant, * * * it affords to the defendant a complete defense to this suit. * * *

Judgment Affirmed.

GREENVAULT v. FARMERS AND MECHANICS' BANK.

2 Douglass (Michigan) 498. (1847)

Attachment—Defective Affidavit—Collateral Attack—Jurisdictional Irregularities.

Ejectment in the Lenawee circuit court by Daniel Greenvault against the President, Directors and Company of the Farmers and Mechanics' Bank. Case reserved for the opinion of this court. Judgment for defendant.

Greenvault claims under attachment proceedings instituted in the Lenawee circuit by C. N. Ormsby against Ed. Bissell, Sept. 28 and levied Oct. 9, 1838, culminating in judgment for Ormsby, Greenvault, and several other creditors who filed claims, in October, 1839, and a sale to Greenvault thereunder, May 2, 1840. The Farmers and Mechanics' Bank claims under a mortgage executed to it by Bissell, Dec. 23, 1838, and since foreclosed. Bissell moved the court at the April term, 1842, to set the attachment and the proceedings thereon aside, because the attachment affidavit was void. The court refused this motion and allowed a new attachment affidavit to be then filed, on authority of the act of April 20, 1839. The tenant of the bank was in possession when this action was commenced.

Baker & Millerd and *E. Lawrence*, for plaintiff.

T. Romeyn, for defendants.

The Court by Whipple, J. The paper purporting to be an affidavit, filed with the clerk as the foundation of the attachment against Bissell under which the plaintiff claims, was sworn to before the clerk of the circuit court of Lenawee county, in vacation. * * * No provision conferring such authority is to be found in the Revised Statutes of 1838; and it follows, as a necessary consequence, that the act of the clerk in administering the oath, was extra judicial and void. * * *

The next question to be determined, is, whether the issuing of the writ, without an affidavit, was also void; or, in other words, did the authority to issue the process, depend upon the making and filing of the affidavit with the clerk? This question must be answered in the affirmative. * * * [*507]

The next inquiry is, what was the legal effect of issuing the

writ without making and filing the affidavit required by law, upon the judgment and subsequent proceedings of the circuit court. This inquiry is answered by the opinion of this court in the cases of *Palmer v. Oakley*, 2 Doug. Mich. 433; *Wight v. Warner*, 1 Doug. Mich. 384, and *Clark v. Holmes*, Ibid. 390. In the case first named, we recognized the rule as laid down in the case of *Elliott v. Peirsol*, 26 U. S. (1 Peters) 328, 340, and the decision of a court which has acquired jurisdiction of a cause, will be held binding until reversed; but that if a court act without authority, its judgments will be regarded as nullities; and that the jurisdiction of a court exercising authority over a subject matter, may be inquired into in every court where the proceedings of the former are relied on, by a party claiming the benefit of such proceedings. The rule thus laid down, is firmly established by the numerous decisions referred to in that case, and is recognized in all courts, where the common law prevails, as too firmly settled to be shaken. Another rule, sustained by an unbroken current of decisions in this country and England is, that where a court is vested with extraordinary powers, under a special statute prescribing its course, that course ought to be exactly observed; and the facts which give it jurisdiction, ought to appear, in order to show that its proceedings are *coram judice*. These principles are applicable to all courts, whether of inferior or superior jurisdiction; the only difference being, that in respect to inferior courts, jurisdiction must appear on the face of the proceedings; while, in regard to superior courts, jurisdiction will be presumed, until the contrary is shown. It will be unnecessary, at this time, to recur to the reasoning [*508] or authorities by which these propositions are sustained, as the cases to which I have referred, contain not only a full exposition of our views upon those propositions, but a full citation of many of the leading authorities by which they are established.

Nothing remains for us but to apply the principles laid down by us in those cases, to the questions now before us. What, then, was the character of the court, and the nature of the jurisdiction it exercised in suits in attachment? The circuit court was a court of general common law jurisdiction, in both civil and criminal cases. Its *general* powers are clearly defined by statute. It was, in other

words, a court of superior jurisdiction. Do proceedings in attachment fall within the circle of the general powers conferred upon the circuit court by statute? They clearly do not. The jurisdiction in this respect is special and extraordinary. The mode of proceeding is peculiar, and in derogation of the common law. It is special, because limited to cases either of absconding or non-resident debtors. It is extraordinary, because the process, contrary to the general rule recognized in our statutes, acts upon the property and not the person of the debtor. It is, in its nature, a proceeding *in rem*, to collect a debt due from a debtor to his creditor. It is in derogation of the common law, because it is a direct proceeding to subject the real estate, by actual sale, to the payment of debts.

I have already said that there was no preliminary proof whatever to authorize the issuing of the attachment. The *facts* which give jurisdiction, do not appear in the proceedings. In the absence of such proof, what, it may be asked, is the judgment which the law pronounces upon such proceedings? There being no authority to issue the process, it is of course void. Being void, the *service* was void; the property attached never was brought within [*509] the jurisdiction of the court, and the court had no authority to order its sale. In short, the circuit court never had jurisdiction of the subject matter, because the facts necessary to call that jurisdiction into exercise never existed. Can a party, then, to such proceedings—one who stood in the character of a plaintiff, so far as the prosecution of his own claim was concerned—protect himself, under a sale made by virtue of an order entered in the records of a court which never acquired jurisdiction of the subject matter—a court within whose jurisdiction the property never was brought? As well might it be contended that a judgment, where the proceedings are *in personam*, could be sustained, when it affirmatively appears in the record, that the person to be affected by the judgment never was brought within the jurisdiction of the court by whom it was rendered. The distinction is well defined between cases where jurisdiction is acquired, and is improvidently exercised, and cases where jurisdiction never was acquired. In the first class of cases the judgment will bind until

reversed. In the other, the judgment is a mere nullity; it is as though it had never been entered. In the first class, the record cannot, in general, be impeached, in the last it may be impeached, especially if it shows on its face that jurisdiction was usurped. Acts done by a court, without authority, are equally as void, and for the same reason, as acts done without authority by either the executive or legislative departments of the government. If either of these departments usurp an authority not conferred by the constitution or laws of the state, and a party seeks to shelter himself under such usurped authority, in a judicial proceeding, the court before whom such a proceeding is pending, would not hesitate to declare all acts done under such authority void. If not, then we should have to submit quietly to the well merited rebuke, that rights the most sacred are no [*510] longer guarded and protected by just laws enacted by our consent; but are left to the tender mercies of a man or set of men, who, although acting under color of authority, are mere usurpers. Apply this reasoning to the case before us. The powers possessed over the person and property of the citizen, by the judicial tribunals, are as accurately defined as are the powers conferred upon the other departments of the government. In the particular case before us, the circuit court of Lenawee county was authorized, by a judicial proceeding, to divest one person of his property and transfer it to another, under a certain state of facts. The facts, however, which authorized the act to be done, did not exist; nevertheless, the court proceed to do the act, by which, under color of legal proceedings, one man is divested of his estate, and it is transferred to another. What difference, it may be asked, is there between such an act, and an act of the legislature which should declare that the property of A. should become the property of B. No difference in principle exists between the two cases. In the one case, it would be regarded as a bold and palpable usurpation; in the other, the usurpation would appear less bold, although more dangerous, because partially concealed beneath the solemn drapery with which judicial proceedings are invested. The theory of our government contemplates that its powers should be distributed, and administered by three departments, neither of which should exer-

cise powers conferred upon another. This principle, so necessary to the existence of free government, should be carefully observed; yet, it is to be regretted, that, to suit the emergencies of particular cases, courts of justice have sometimes assumed legislative powers. Not contented with expounding the law, they have resolved themselves into legislative bodies, and made laws adapted to the supposed equities of particular cases. The opinions of men are thus [*511] substituted for the will of the community expressed through the legislature. In the case before us, the legislature have thought proper to give to the circuit court jurisdiction in certain cases, and upon certain conditions. To call this jurisdiction into exercise, it must be shown that the conditions upon which it depended have been fulfilled; and where this jurisdiction is special and extraordinary, not falling within the line which circumscribes the general powers of the court, it would seem that the record itself should show affirmatively the existence of all the facts necessary to call into action the special powers thus granted. 3 Blackf. R. 230.

Much reliance was placed upon the case of *Voorhees v. Bank United States*, 35 U. S. (10 Peters) 449, 473. But the distinction between that case and the one before us is so obvious as to render it impossible to use it as an authority. 1. In that case, Voorhees was the alienee of Cutter, who was the defendant in the attachment, by a conveyance executed *long after* the judgment in attachment. Cutter, then, stood in no better plight than Voorhees would have done, had he brought suit against the bank. 2. It was competent for Voorhees to have brought error upon the judgment, which he failed to do. In the case before us, the defendants could not have availed themselves of this remedy to reverse the proceedings below. 3. Stanley, under whom the Bank of the United States purchased, was regarded in the light of an *innocent* purchaser; whereas, in the case before us, the plaintiff was a party to the proceedings in attachment, and was bound to see that the court had jurisdiction. The Supreme Court of the United States decided in that case, that from what appeared on the face of the proceedings, it might be fairly presumed that all the facts necessary to give jurisdiction to the court of common pleas of Ohio, were shown to that court before the rendition of the judgment confirming the

acts of the [*512] auditors. In the case before us, nothing is left to implication. The verdict sets out all the proceedings, from which it manifestly appears that there was no affidavit proving the facts necessary to confer authority upon the circuit court to issue the process. * * *

It is not to be denied, that some of the views expressed by Mr. Justice Baldwin, touching the *conclusiveness* of judgments rendered in attachment causes, differ essentially from those expressed by other judges and courts of great respectability. * * *

The last question to be considered, is, as to the legal [*513] effect of the filing a new affidavit, by the plaintiff, by virtue of the order made at the April Term, 1842, of the circuit court.

First: Was it competent to grant the order? The act of 1839 provides, that "no writ shall be quashed on account of any defect in the affidavit on which the same issued: *Provided*, That the plaintiff, his agent, or attorney shall, whenever objection may be made, file such affidavit as is required by law." S. L. 1839, p. 228, § 36. This law, it is to be observed, was not in force at the time the paper purporting to be an affidavit, and upon which the attachment was issued, was filed. Do the words of the act authorize a new affidavit to be filed, where the original affidavit was void; or, in other words, where no affidavit was made or filed, as contemplated by the statute? The amendatory act speaks of *defects* in the *affidavit* upon which the writ issued; from which it results, by necessary implication, that *defects* could not be supplied, in cases where no affidavit whatever was filed. It evidently contemplated cases where affidavits were filed, but which, through ignorance, inadvertence, or mistake, did not embody all the facts necessary to authorize the issuing of the writ; but it could not have been the intention of the legislature to authorize an affidavit to be filed after judgment was rendered and the property attached sold, and thus legalize acts which were absolutely void. The language, in the latter part of the act, is conclusive upon this point. It authorizes a party to "file such affidavit as is required by law;" implying that the original *affidavit* was *not* such as was required by law. In the case before us, if the construction contended for by the plaintiff, be correct, an affidavit filed three years after the rendition of the judgment,

would have the effect of rendering a proceeding legal, which was before that time a mere nullity;—of giving jurisdiction to a court, which, at the time the [*514] writ issued and the judgment was rendered, had no jurisdiction. Such a power the legislature would hardly exercise; and there is nothing in the amendatory act, from which it can, with any show of reason, be contended that such was the intention of the legislature.

But, supposing for a moment, that the legislature might, in the plenitude of its authority, exercise such a power, and that the act of 1839 warrants the construction contended for by the plaintiff, how could it affect the rights of the present defendants? The filing, with the register, of the writ of attachment, did not operate as constructive notice to the defendants, who purchased soon after the date of the writ, or create a lien on the premises, for the reason that the writ itself was void. To affect a party with notice, the deed, or in this case, the writ, must be such an one as in the case of a deed, the law authorizes to be registered, or in the case of a writ, it must be a writ, the issuing of which is authorized by law. The special verdict does not find the defendants had *actual* notice of the pendency of the proceedings in attachment. There being, then, neither actual nor constructive notice, how could the rights of the defendants be affected by an order of the court made three years after they had acquired a valid title to the premises? No *ex parte* legislation, or order of the court founded upon such legislation, could, under the circumstances stated in the special verdict, have the effect claimed for it, viz: that of divesting an estate acquired by the defendants from Bissell, and transferring it to the plaintiff in this case. The original proceedings in attachment, then, being void, and no subsequent legislation, or orders of the court, having applied remedies sufficiently potent to cure those proceedings of the infirmities which beset them, it follows, that the judgment on the special verdict must be rendered for the defendants.

Certified accordingly.

WELLS v. AMERICAN EXPRESS CO.

55 Wisconsin 23, 12 N. W. 441, 42 Am. Rep. 695. (1882)

Garnishment—Jurisdiction—Effect of Payment under Garnishment as a Defense—Proper Manner of Pleading—Necessary Proof—Presumption of Regularity—Proving Contents of Lost Records.

Action by Wells against American Express Company for money sent him by express and not delivered. From judgment for plaintiff defendant brings error. Affirmed.

The same case on former appeals is reported in 44 Wis. 342, and 49 Wis. 224. Among other defenses the defendant set up payment under garnishment proceedings. The money was consigned to "Wells & Cartwright," but belonged to Wells alone, and the garnishments were in suits against Cartwright.

Finches, Lynde & Miller, for appellants.

Fish & Dodge, for appellee.

The Court by Orton, J. * * * The plaintiff is entitled to recover, unless something was done which was tantamount to a delivery of the money to Cartwright before this claim of the plaintiff was set up and demand made by him for it as his own property, exclusive of Cartwright. This leads to the question whether this money has been subjected to the garnishment of the defendant in cases or on judgment against Cartwright, before this claim and demand of the plaintiff for all of the money as his own, which is the only pretense of its delivery to the consignees. [33] * * * The record evidence in this case, which consists exclusively of the docket entries of the justice of the peace who entertained jurisdiction of the garnishee proceedings against the defendant, must stand or fall by itself. It seems that the papers are lost or cannot be found, and there was no attempt to prove their contents. The entries in the docket of a justice showing appearance of the defendant would be sufficient to warrant the judgment in ordinary [34] common law causes. But the proceeding of garnishment is special and statutory, and in derogation of the common law. It is a proceeding by which the debtor is compelled to pay another than his creditor, and the right of the creditor is transferred to another against his will; and this can only be done by force of the statute strictly pursued. It is in the nature of a proceeding *in rem*, by

which the plaintiff is sought to be invested with the right to appropriate to the satisfaction of his claim against the defendant a debt due from the garnishee to him. This being the nature of the proceeding, the principle is elementary that jurisdiction of the court therein must affirmatively appear. *Robertson v. Kinkhead*, 26 Wis. 560; *Supervisors of Crawford Co. v. Le Clerc*, 3 Pin. 325; *In re Booth and Rycraft*, 3 Wis. 157.

The late learned and eminent chief justice of this court (Ryan), in *Steen v. Norton*, 45 Wis. 412, uses this language in respect to this proceeding: "It is not the policy of the statute to place this anomalous action, like ordinary actions, at the mere discretion of the plaintiff, or to give justices of the peace unqualified jurisdiction of it, as in ordinary actions, where every person can become a plaintiff, have process, and put the justice's jurisdiction in motion on demand. The plaintiff in garnishee proceedings, as in attachment as *mesne* process, replevin, and the like, can put in motion the jurisdiction of the justice only by complying with statutory prerequisites. And the justice takes jurisdiction of the proceeding only upon the plaintiff's compliance with the preliminaries which the statute makes the condition of jurisdiction. In order to entitle a plaintiff to have recourse to the process of garnishment, in order to confer on the justice jurisdiction to entertain it, *he must first make the affidavit required by the statute*. . . . An affidavit materially defective stands as no affidavit. All proceedings founded on a materially defective affidavit are *coram non judice*. And no appearance, no submission of the garnishee, can operate to [35] waive the defect of jurisdiction. . . . He cannot voluntarily appear and substitute his creditor's creditor for his own, because that goes to jurisdiction of the subject, not to jurisdiction of his person."

In most and perhaps all of the cases of garnishment sought to be introduced in evidence in defense of this action, there is an entry by the justice that an affidavit was made and filed. What the affidavit contained does not appear. The affidavit, being the prerequisite of jurisdiction, must not only appear upon the records, but be strictly sufficient; and, not appearing, no jurisdiction whatever is shown in the justice. This is a fatal objection to the

proceedings, and the circuit court properly refused to admit them in evidence. * * * [*36] * * *

The judgment of the circuit court is affirmed.

Lyon, J., took no part.

The appellant moved for a rehearing; and the following opinion was filed May 10, 1882:

The Court by Orton, J. * * * [*37] * * * All of these docket entries were ruled out, presumably on these grounds—[that the jurisdiction of the justice did not appear]. No other evidence, of record or otherwise, was offered of the garnishee proceedings, and this was the only point in respect to such proceedings before this court on the appeal. The ruling of the circuit court was sustained on the ground that the jurisdiction of the justices in the proceedings did not appear. It is now complained and contended that the question of jurisdiction was not raised, and was therefore waived. That objection is sufficiently answered by the foregoing references. But, aside from this specific objection, the docket entries were clearly *incompetent* without first showing jurisdiction, and such jurisdiction was not shown by such entries. In the brief of the learned counsel of the respondent the point was distinctly made that the proceedings, so far as sought to be shown, were void for want of jurisdiction. This point was answered in the brief of the learned counsel of the appellant as follows: "The defendant was adjudged by the justice's court to pay the money to the creditors suing out the garnishees. The papers are all lost. There is nothing left but docket entries; nor does it matter, as we see, whether the justice's court was right or wrong in its decision. The money was subject to garnishment."

No objection was made, it is complained, that the court had no jurisdiction. We have seen that such objection was distinctly made, and more than once. No objection was made to the introduction of the papers in the garnishee proceedings, including the affidavit, by which only jurisdiction could be shown, because they were not offered, and there was no offer to prove their contents if lost. It would seem that the contention of the learned counsel of the appellant arises from a misapprehension of the record, and from not remembering that the stipulation, which probably dis-

penses [*38] with the proof of the garnishee proceedings beyond the docket entries, had been withdrawn previous to the last trial.

* * *

By the Court.—The motion for reargument is denied, with \$25 costs.

PARSONS v. PARSONS.

101 Wisconsin 76, 70 Am. St. Rep. 894, 77 N. W. 147. (1898)

Adoption of Children—Jurisdiction—Notice to Parent—Estoppel.

Petition by Cynthia A. Parsons in the county court of Fond du Lac county for an order vacating an order for adoption theretofore entered by said court on the petition of the present petitioner's husband, who has since died. The county court having ordered the present petition dismissed, the petitioner appealed to the circuit court, where the order was affirmed, and she now appeals to this court. Affirmed.

Edward S. Bragg, for appellant.

Gary & Forward, for respondent.

The Court by Marshall, J. This case turns on whether the county court obtained jurisdiction to make the order of adoption. It is challenged solely upon the ground that the consent of the living parent, the father, was not given, and there was no adjudication, on notice of the absent parent, of the fact of abandonment, nor any consent given in place of that of [*79] the alleged abandoning parent by the next of kin, nor by a guardian or a suitable person appointed by the court. There is no claim but that the petition, in form, complies with the statute. It alleges every fact which the statute requires, was made by the proper persons, and was verified by them. True, it does not appear that notice was given to the father, and, if that were requisite to the jurisdiction of the court to take any steps in the proceedings, the order of adoption was void. On this subject we are furnished with a learned discussion of the statute and a citation of many authorities on both sides of the controversy, in some of which the subject is considered at great length, but if the statute itself furnishes a plain solution of the question we have no need to go elsewhere to support it.

The statute to be considered is § 4022, R. S. 1878, which reads as follows: "No such adoption shall be made without the written

consent of the living parents of such child, unless the court shall find that one of the parents has abandoned the child, or gone to parts unknown." Thus it will be seen that, upon the fact being established that the living parent has abandoned his child, he is deemed by the statute to have thereby relinquished all parental right to be consulted in respect to the child's welfare, and his consent to the adoption is therefore dispensed with. The term "abandon" obviously means no more than neglect or refusal to perform the natural and legal obligations of care and support which parents owe to their children. The fact of abandonment, judicially determined, was essential to the jurisdiction; not essential that it should be determined on proper evidence, necessarily, or in accordance with the truth, because mere error in that regard does not affect jurisdiction. If jurisdiction be obtained to determine a fact, its determination wrong or on insufficient or improper evidence is immaterial on the question of legal right to proceed judicially to the next step. That is deemed to be elementary. Now, that [*80] the fact of abandonment was judicially determined in this proceeding must be conceded. True, there was no evidence, so far as appears, but the verified petition, and the allegation of abandonment was on information and belief. That was mere hearsay, but that fact goes merely to the sufficiency of proof, which, as stated, may involve error, but not jurisdictional error. A judicial determination may be contrary to conclusive evidence or legal evidence, or without any evidence, yet cannot be impeached for want of jurisdiction. *Van Fleet, Collateral Attack*, §§ 693, 695. That rule applies to all judicial proceedings. It has often been invoked in proceedings like this. As for example in *Van Matre v. Sankey*, 148 Ill. 536, 39 Am. St. 196, 36 N. E. 628; it was held that if the court has jurisdiction to act at all, however erroneous its action, it must still stand until reversed on appeal.

It follows that the only remaining question on this branch of the case is, did the court have jurisdiction to act on the subject of the alleged abandonment, in the absence of notice, actual or constructive, to the parent? That must be answered in the affirmative. When the proceedings in question were had the statute did not require notice, actual or constructive, to a parent who had

abandoned his child. That was unquestionably the legislative idea. Resort to rules of liberal construction is not necessary to reach that conclusion. But if the statute would admit of two constructions, the result would be the same. We would feel bound to repudiate the doctrine of strict construction contended for vigorously by appellant. The adoption statute is a humane provision which looks to the interests of children primarily. That is its controlling idea and policy. Therefore, every reasonable intendment should be indulged in, in case of doubt, in the line of promoting that object. Other courts have taken the same view, but, if it were otherwise, our duty to carry out an obvious legislative intent would be the same. That the statute was designed to enable [*81] those who are not blessed with the love and society of children in the family to acquire it by taking into the family fold and giving a home to those in need of such shelter, protection, and care, thus creating mutual obligations, promotive of mutual happiness and the moral well-being of society, is most clear. It has made, and is making, a multitude of happy homes, happy parents, happy children, and valuable members of society, and no narrow construction should be indulged in that will tend to defeat a result so obviously intended and in every way so beneficial.

The conclusion reached as to the necessity of notice to the absent and abandoning parent, is but affirming what was clearly held, inferentially, in *Schilts v. Roenitz*, 86 Wis. 31. The court there, while holding that the order was not conclusive upon the father on the fact of abandonment, who had no notice of the proceedings, said that it might, however, well be held valid as to the child, obviously meaning because the court had jurisdiction that far, which of course included jurisdiction of the petitioner who commenced the proceedings. That such was the intention of the court, as understood by the legislative department of the government, is evidenced by the fact that subsequently a proviso was added to the section in the following words: "Provided, that unless the living parent or parents of a minor consent to such adoption, it shall be the duty of the court having jurisdiction of the proceedings, upon the filing of any petition for adoption, by order to appoint a time and place for hearing such petition and cause

notice of such time and place to be given to such parent or parents by personal service of said notice on such parent or parents at least ten days before the hearing or by publication thereof in a newspaper at least three weeks successively prior to said hearing, and when notice is duly given as herein provided the parent of any minor shall be bound by the order of adoption as fully as though he had consented thereto." (Laws of 1895, ch. 18.) [*82] That notice to the parent is not requisite to a valid determination of the fact of abandonment as regards all other parties to the proceedings, has been held in numerous cases elsewhere, some of which are cited in the briefs of counsel. *Nugent v. Powell*, 4 Wyo. 173, 62 Am. St. 17; *Van Fleet, Collateral Attack*, § 408; *Barnard v. Barnard*, 119 Ill. 92.

It is further contended by appellant that the county court did not have jurisdiction, because consent to the adoption was not given by the next of kin. Whether the person who signed as next of kin was such in fact was one of the questions which the court had jurisdiction to determine. It was not requisite to jurisdiction that it should be determined rightly. The trite saying applies, that every court has jurisdiction to err in any case, but mere error in determining something the court has a right to determine is irre-mediabale by challenge to the jurisdiction of the court. That the county judge had jurisdiction to determine that W. S. Russell was next of kin to the adopted child, cannot reasonably be questioned. That the fact was judicially determined appears upon the face of the order. True, it was determined by the verified petition only, so far as appears by anything in the proceedings, but, as stated before, that was not material to the jurisdiction. If determined without any evidence whatever the result would be the same. No doubt it was competent for the county judge to have required other evidence than the petition, but he was not bound to do so. If satisfied of the fact by the petition itself, whether satisfied rightly or wrongly, it was sufficient for the validity of the proceedings. The rule on that subject was definitely stated by Mr. Justice Winslow in *Cody v. Cody*, 98 Wis. 445, to the effect that three things only are necessary to give jurisdiction in an action or proceeding: First, a tribunal legally organized; second, jurisdiction of the subject-

matter; third, jurisdiction of the person; and these things all being present, jurisdiction continues, however erroneous the proceedings [*83] leading up to the result finally obtained, unless one of the elements be in the meantime lost.

So a conclusion is reached, on the merits of the case, that the decision of the circuit court was right and must be affirmed. But if we were to go further, the result would not be otherwise. The proceedings to avoid the judgment of adoption are clearly of an equitable nature, and after the lapse of many years, during which time the status of the subject of adoption has been recognized as legally fixed by the judgment of the county court, by all parties to the proceedings, one of those parties on whose motion the judgment was rendered is in no position to appeal to the equity powers of the court to declare it void. The plainest principles of estoppel apply to the situation. Appellant petitioned for the judgment. It was entered on her motion. The person most interested, the child, was a ward of the court, and its status for life was entirely and irrevocably changed by the result of the proceedings if they were valid. Their validity was recognized by the appellant till she became pecuniarily interested in changing her position. Clearly, she cannot be aided by a court of equity to do that to the injury of the person she was instrumental in locating in her family as her adopted son.

By the Court—The judgment of the circuit court is affirmed.

WINDSOR v. McVEIGH.

93 United States (3 Otto) 274. (1876)

Jurisdiction — Collateral Attack — Effect of Irregularities — Right to Hearing.

S. F. Beach, for the plaintiff in error.

Philip Phillips and *John Howard*, *contra*.

The Court by Field, J. This was an action of ejectment to recover certain real [*275] property in the city of Alexandria, in the state of Virginia. It was brought in the corporation court of that city, and a writ of error from the court of appeals of the state to review the judgment obtained having been refused, the case was brought here directly by a writ of error from this court.

Authority for this mode of procedure will be found stated in the case of *Gregor v. McVeigh*, 23 Wallace 294.

The plaintiff in the corporation court proved title in himself to the premises in controversy, and consequent right to their immediate possession, unless his life-estate in them had been divested by a sale under a decree of condemnation rendered in March, 1864, by the District Court of the United States for the Eastern District of Virginia, upon proceedings for their confiscation. The defendant relied upon the deed to his grantor executed by the marshal of the district upon such sale.

The proceedings mentioned were instituted under the act of Congress of July 17, 1862, "to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes."

In July, 1863, the premises in controversy were seized by the marshal of the district, by order of the district attorney, acting under instructions from the attorney-general. In August following, a libel of information against the property was filed in the name of the United States, setting forth that the plaintiff in this case was the owner of the property in question; that he had, since the passage of the above act, held an office of honor and trust under the government of the so-called Confederate States, and in various ways had given aid and comfort to the rebellion; that the property had been seized in pursuance of the act in compliance with instructions from the attorney-general, and, by reason of the premises, was forfeited to the United States, and should be condemned. It closed with a prayer that process of monition might issue against the owner or owners of the property and all persons interested or claiming an interest therein, warning them at some early day "to appear and answer" the libel; and, as the owner of the property was a non-resident and absent, that an order of publication in the usual form be also made. Upon this libel the district judge ordered process of monition to issue as prayed, and designated [*276] a day and place for the trial of the cause, and that notice of the same, with the substance of the libel, should be given by publication in a newspaper of the city, and by posting at the door of the court-house. The process of

monition and notice were accordingly issued and published. Both described the land and mentioned its seizure, and named the day and place fixed for the trial. The monition stated that at the trial all persons interested in the land, or claiming an interest, might "appear and make their allegations in that behalf." The notice warned all persons to appear at the trial, "to show cause why condemnation should not be decreed, and to intervene for their interest."

The owner of the property, in response to the monition and notice, appeared by counsel, and filed a claim to the property and an answer to the libel. Subsequently, on the 10th of March, 1864, the district attorney moved that the claim and answer and the appearance of the respondent by counsel be stricken from the files, on the ground that it appeared from his answer that he was at the time of filing the same "a resident within the city of Richmond, within the Confederate lines, and a rebel." On the same day the motion was granted, and the claim and answer ordered to be stricken from the files. The appearance of the respondent was by his answer. The court immediately entered its sentence and decree, condemning the property as forfeited to the United States, reciting that, the usual proclamation having been made, the default of all persons had been duly entered. The decree ordered the issue of a *venditioni exponas* for the sale of the property, returnable on the sixteenth day of the following April. At the sale under this writ the grantor of the defendant became the purchaser.

The question for determination is, whether the decree of condemnation thus rendered, without allowing the owner of the property to appear in response to the monition, interpose his claim for the property, and answer the libel, was of any validity. In other words, the question is, whether the property of the plaintiff could be forfeited by the sentence of the court in a judicial proceeding to which he was not allowed to appear and make answer to the charges against him, upon the allegation of which the forfeiture was demanded. [*277]

There were several libels of information filed against the property of the plaintiff at the same time with the one here men-

tioned. They were identical in their allegations, except as to the property seized, and the same motion to strike from the files the appearance, claim, and answer of the respondent was made in each case, and on the same day, and similar orders were entered and like decrees of condemnation. One of these was brought here, and is reported in the 11th of Wallace. In delivering the unanimous opinion of this court, upon reversing the decree in the case, and referring to the order striking out the claim and answer, Mr. Justice Swayne said: "The order in effect denied the respondent a hearing. It is alleged he was in the position of an alien enemy, and could have no *locus standi* in that forum. If assailed there, he could defend there. The liability and right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice." *McVeigh v. United States*, 78 U. S. (11 Wall.) 259, 267.

The principle stated in this terse language lies at the foundation of all well-ordered systems of jurisprudence. Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.

That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject-matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has any thing to say, why the judgment should not be rendered. A denial to a party of the benefit of a notice would be in effect to [*278] deny that he is entitled to notice at all, and the sham and deceptive proceeding

had better be omitted altogether. It would be like saying to a party, Appear, and you shall be heard; and, when he has appeared, saying, Your appearance shall not be recognized, and you shall not be heard. In the present case, the district court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict, clothed in the form of a judicial sentence.

The law is, and always has been, that whenever notice or citation is required, the party cited has the right to appear and be heard; and when the latter is denied, the former is ineffectual for any purpose. The denial to a party in such a case of the right to appear is in legal effect the recall of the citation to him. The period within which the appearance must be made and the right to be heard exercised is, of course, a matter of regulation, depending either upon positive law, or the rules or orders of the court, or the established practice in such cases. And if the appearance be not made, and the right to be heard be not exercised, within the period thus prescribed, the default of the party prosecuted, or possible claimants of the property, may, of course, be entered, and the allegations of the libel be taken as true for the purpose of the proceeding. But the denial of the right to appear and be heard at all is a different matter altogether.

The position of the defendant's counsel is, that, as the proceeding for the confiscation of the property was one *in rem*, the court, by seizure of the property, acquired jurisdiction to determine its liability to forfeiture, and consequently had a right to decide all questions subsequently arising in the progress of the cause; and its decree, however erroneous, cannot, therefore, be collaterally assailed. In supposed support of this position, opinions of this court in several cases are cited, where similar language is used respecting the power of a court to pass upon questions arising after jurisdiction has attached. But the preliminary proposition of the counsel is not correct. The jurisdiction acquired by the court by seizure of the *res* was not to condemn the property without further proceedings. The physical [*279] seizure did not of

itself establish the allegations of the libel, and could not, therefore, authorize the immediate forfeiture of the property seized. A sentence rendered simply from the fact of seizure would not be a judicial determination of the question of forfeiture, but a mere arbitrary edict of the judicial officer. The seizure in a suit *in rem* only brings the property seized within the custody of the court, and informs the owner of that fact. The theory of the law is, that all property is in the possession of its owner, in person or by agent, and that its seizure will, therefore, operate to impart notice to him. Where notice is thus given, the owner has the right to appear and be heard respecting the charges for which the forfeiture is claimed. That right must be recognized and its exercise allowed before the court can proceed beyond the seizure to judgment. The jurisdiction acquired by the seizure is not to pass upon the question of forfeiture absolutely, but to pass upon that question after opportunity has been afforded to its owner and parties interested to appear and be heard upon the charges. To this end some notification of the proceedings, beyond that arising from the seizure, prescribing the time within which the appearance must be made, is essential. Such notification is usually given by monition, public proclamation, or publication in some other form. The manner of the notification is immaterial, but the notification itself is indispensable.

These views find corroboration in the opinion of Mr. Justice Story, in the case of *Bradstreet v. Neptune Insurance Co.*, 3 Sumn. 600, Fed. Cas. No. 1,793. In that case, the action was upon a policy of insurance upon a vessel, the declaration alleging its loss by seizure of the Mexican government. The defendants admitted the seizure, but averred that it was made and that the vessel was condemned for violation of the revenue laws of Mexico, and to prove the averment produced a transcript of the record of the proceedings of the Mexican court against the vessel, and of the decree of condemnation. Among the questions considered by the court was the effect of that record as proof of the laws of Mexico, and of the jurisdiction of the court and the cause of seizure and condemnation. After stating that the sentence of a foreign court of admiralty and prize *in rem* was in general

conclusive, not only in respect to the parties in interest, but [*280] also for collateral purposes in collateral suits, as to the direct matter of title and property in judgment, and as to the facts on which the tribunal professed to proceed, Mr. Justice Story said, that it did not strike him that any sound distinction could be made between a sentence pronounced *in rem* by a court of admiralty and prize, and a like sentence pronounced by a municipal court upon a seizure or other proceeding *in rem*; that in each the sentence was conclusive as to the title and property, and, it seemed to him, was equally conclusive as to the facts on which the sentence professed to be founded. But the learned judge added, that it was an essential ingredient in every case, when such effect was sought to be given to the sentence, that there should have been proper judicial proceedings upon which to found the decree; that is, that there should have been some certain written allegations of the offence, or statement of the charge for which the seizure was made, and upon which the forfeiture was sought to be enforced; and that there should be some personal or public notice of the proceedings, so that the parties in interest, or their representatives or agents, might know what the offence was with which they were charged, and might have an opportunity to defend themselves, and to disprove the same. "It is a rule," said the learned judge, "founded in the first principles of natural justice, that a party shall have an opportunity to be heard in his defence before his property is condemned, and that charges on which the condemnation is sought shall be specific, determinate, and clear. If a seizure is made and condemnation is passed without the allegation of any specific cause of forfeiture or offence, and without any public notice of the proceedings, so that the parties in interest have no opportunity of appearing and making a defence, the sentence is not so much a judicial sentence as an arbitrary sovereign edict. It has none of the elements of a judicial proceeding, and deserves not the respect of any foreign nation. It ought to have no intrinsic credit given to it, either for its justice or for its truth, by any foreign tribunal. It amounts to little more, in common sense and common honesty, than the sentence of the tribunal which first punishes and then:

hears the party,—*castigatque, auditque*. It may be binding upon the subjects of that particular nation. But, upon the [*281] eternal principles of justice, it ought to have no binding obligation upon the rights or property of the subjects of other nations; for it tramples under foot all the doctrines of international law, and is but a solemn fraud, if it is clothed with all the forms of a judicial proceeding.”

In another part of the same opinion the judge characterized such sentences “as mere mockeries, and as in no just sense judicial proceedings;” and declared that they “ought to be deemed, both *ex directo in rem* and collaterally, to be mere arbitrary edicts or substantial frauds.”

This language, it is true, is used with respect to proceedings *in rem* of a foreign court, but it is equally applicable and pertinent to proceedings *in rem* of a domestic court, when they are taken without any monition or public notice to the parties. In *Woodruff v. Taylor*, 20 Vt. 65, the subject of proceedings *in rem* in our courts is elaborately considered by the Supreme Court of Vermont. After stating that in such cases notice is given to the whole world, but that from its nature it is to the greater part of the world constructive only, and mentioning the manner in which such notice is given in cases of seizure for violation of the revenue laws, by publication of the substance of the libel with the order of the court thereon specifying the time and place of trial, and by proclamation for all persons interested to appear and contest the forfeiture claimed, the court observed, that in every court and in all countries where judgments were respected, notice of some kind was given, and that it was just as material to the validity of a judgment *in rem* that constructive notice at least should appear to have been given as that actual notice should appear upon the record of a judgment *in personam*. “A proceeding,” continued the court, “professing to determine the right of property, where no notice, written or constructive, is given, whatever else it might be called, would not be entitled to be dignified with the name of a judicial proceeding. It would be a mere arbitrary edict, not to be regarded anywhere as the judgment of a court.”

In the proceedings before the district court in the confiscation case, monition and notice, as already stated, were issued and published; but the appearance of the owner, for which they called, having been refused, the subsequent sentence of [*282] confiscation of his property was as inoperative upon his rights as though no monition or notice had ever been issued. The legal effect of striking out his appearance was to recall the monition and notice as to him. His position with reference to subsequent proceeding was then not unlike that of a party in a personal action, after the service made upon him has been set aside. A service set aside is never service by which a judgment in the action can be upheld.

The doctrine invoked by counsel, that, where a court has once acquired jurisdiction, it has a right to decide every question which arises in the cause, and its judgment, however erroneous, cannot be collaterally assailed, is undoubtedly correct as a general proposition, but, like all general propositions, is subject to many qualifications in its application. All courts, even the highest, are more or less limited in their jurisdiction: they are limited to particular classes of actions, such as civil or criminal; or to particular modes of administering relief, such as legal or equitable; or to transactions of a special character, such as arise on navigable waters, or relate to the testamentary disposition of estates; or to the use of particular process in the enforcement of their judgment. *Norton v. Meader*, 4 Sawyer 603, Fed. Cas. No. 10,351. Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. Instances of this kind show that the general doctrine stated by counsel is subject to

many qualifications. The judgments mentioned, given in the cases supposed, would not be merely erroneous: they would be absolutely void, because the court in rendering them would transcend the limits of its authority in those cases. See the language of Mr. Justice [*283] Miller, to the same purport, in the case of *Ex parte Lange*, 18 Wall. 163. So it was held by this court in *Bigelow v. Forrest*, 9 id. 339, 351, that a judgment in a confiscation case, condemning the fee of the property, was void for the remainder, after the termination of the life-estate of the owner. To the objection that the decree was conclusive that the entire fee was confiscated, Mr. Justice Strong, speaking the unanimous opinion of the court, replied: "Doubtless a decree of the court, having jurisdiction to make the decree, cannot be impeached collaterally; but, under the act of Congress, the district court had no power to order a sale which should confer upon the purchaser rights outlasting the life of French Forrest (the owner). Had it done so, it would have transcended its jurisdiction." Id. 350.

So a departure from established modes of procedure will often render the judgment void; thus, the sentence of a person charged with felony, upon conviction by the court, without the intervention of a jury, would be invalid for any purpose. The decree of a court of equity upon oral allegations, without written pleadings, would be an idle act, of no force beyond that of an advisory proceeding of the chancellor. And the reason is, that the courts are not authorized to exert their power in that way.

The doctrine stated by counsel is only correct when the court proceeds, after acquiring jurisdiction of the cause, according to the established modes governing the class to which the case belongs, and does not transcend, in the extent or character of its judgment, the law which is applicable to it. The statement of the doctrine by Mr. Justice Swayne, in the case of *Cornett v. Williams*, 20 Wallace 226, is more accurate. "The jurisdiction," says the justice, "having attached in the case, every thing done *within the power of that jurisdiction*, when collaterally questioned, is held conclusive of the rights of the parties, unless impeached for fraud." 20 Wall. 250.

It was not within the power of the jurisdiction of the district

court to proceed with the case, so as to affect the rights of the owner after his appearance had been stricken out, and the benefit of the citation to him thus denied. For jurisdiction [*284] is the right to hear and determine; not to determine without hearing. And where, as in that case, no appearance was allowed, there could be no hearing or opportunity of being heard, and, therefore, could be no exercise of jurisdiction. By the act of the court, the respondent was excluded from its jurisdiction.

Judgment affirmed.

Miller, Bradley and Hunt, JJ., dissented.

This decision has been eulogized (4 Cent. Law J. 61) and criticized. Freeman, Judgments, § 118; Van Fleet, Collateral Attack, § 400; Kelly v. People, 115 Ill. 585, 588. The opinion and decision seem to me subversive of every distinction between want of jurisdiction and the improper exercise of it. It is the best of a large number of opinions maintaining similar views.

PENNOYER v. NEFF.

95 United States (5 Otto) 714. (1877)

Ejectment—Constitutional Law—Due Process of Law—Judgments—In Rem or In Personam, Effect, Validity—Jurisdiction, of Res, of Parties—Method of Service—Collateral Attack.

Action in the United States circuit court for the district of Oregon by Neff against Pennoyer to recover land in Multnomah county, Oregon. From a judgment for Neff, on a special verdict found by the court on a trial without a jury pursuant to written and filed stipulation, Pennoyer brings error. Affirmed.

Neff claimed under a patent issued to him by the United States. Pennoyer claimed by virtue of a sheriff's sale on an execution on a judgment against Neff in favor of J. H. Mitchell. The other essential facts appear in the opinion.

W. F. Trimble, for plaintiff in error.

James K. Kelly, for defendant in error.

The Court by Field, J. This is an action to recover the possession of a tract of land, of the alleged value of \$15,000, situated in the state of Oregon. The plaintiff asserts title to the premises by a patent of the United States issued to him in 1866, under the act of Congress of September 27, 1850, usually known as the Donation law of Oregon. The defendant claims to have acquired the premises under a sheriff's deed, made upon a sale of the property on execution issued upon a judgment recovered

against the plaintiff in one of the circuit courts of the state. The case turns upon the validity of this judgment.

It appears from the record that the judgment was rendered in February, 1866, in favor of J. H. Mitchell, for less than \$300, including costs, in an action brought by him upon a demand for services as an attorney; that, at the time the action was commenced and the judgment rendered, the defendant therein, the plaintiff here, was a non-resident of the state; [*720] that he was not personally served with process, and did not appear therein; and that the judgment was entered upon his default in not answering the complaint, upon a constructive service of summons by publication.

The Code of Oregon provides for such service when an action is brought against a non-resident and absent defendant, who has property within the state. It also provides, where the action is for the recovery of money or damages, for the attachment of the property of the non-resident. And it also declares that no natural person is subject to the jurisdiction of a court of the state, "unless he appear in the court, or be found within the state, or be a resident thereof, or have property therein; and, in the last case, only to the extent of such property at the time the jurisdiction attached." Construing this latter provision to mean, that, in an action for money or damages where a defendant does not appear in the court, and is not found within the state, and is not a resident thereof, but has property therein, the jurisdiction of the court extends only over such property, the declaration expresses a principle of general, if not universal, law. The authority of every tribunal is necessarily restricted by the territorial limits of the state in which it was established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power, and be resisted as mere abuse. *D'Arcy v. Ketchum et al.*, 11 How. 165. In the case against the plaintiff the property here in controversy sold under the judgment rendered was not attached, nor in any way brought under the jurisdiction of the court. Its first connection with the case was caused by a levy of the execution. It was not, therefore, disposed of

pursuant to any adjudication, but only in enforcement of a personal judgment, having no relation to the property, rendered against a non-resident without service of process upon him in the action, or his appearance therein. The court below did not consider that an attachment of the property was essential to its jurisdiction or to the validity of the sale, but held that the judgment was invalid from defects in the affidavit upon which the order of publication was obtained, and in the affidavit by which the publication was proved. [*721]

There is some difference of opinion among the members of this court as to the rulings upon these alleged defects. The majority are of opinion that inasmuch as the statute requires, for an order of publication, that certain facts shall appear by affidavit *to the satisfaction of the court or judge*, defects in such affidavit can only be taken advantage of on appeal, or by some other direct proceeding, and cannot be urged to impeach the judgment collaterally. The majority of the court are also of opinion that the provision of the statute requiring proof of the publication in a newspaper to be made by the "affidavit of the printer, or his foreman, or his principal clerk," is satisfied when the affidavit is made by the editor of the paper. The term "printer," in their judgment, is there used not to indicate the person who sets up the type,—he does not usually have a foreman or clerks,—it is rather used as synonymous with publisher. The Supreme Court of New York so held in one case; observing that, for the purpose of making the required proof, publishers were "within the spirit of the statute." *Bunce v. Reed*, 16 Barb. (N. Y.) 347. And, following this rule, the Supreme Court of California held that an affidavit made by a "publisher and proprietor" was sufficient. *Sharp v. Daugney*, 33 Cal. 505. The term "editor," as used when the statute of New York was passed, from which the Oregon law is borrowed, usually included not only the person who wrote or selected the articles for publication, but the person who published the paper and put it into circulation. Webster, in an early edition of his dictionary, gives as one of the definitions of an editor, a person "who superintends the publication of a newspaper." It is principally since that time that the business of an editor has

been separated from that of a publisher and printer, and has become an independent profession.

If, therefore, we were confined to the rulings of the court below upon the defects in the affidavits mentioned, we should be unable to uphold its decision. But it was also contended in that court, and is insisted upon here, that the judgment in the state court against the plaintiff was void for want of personal service or process on him, or of his appearance in the action in which it was rendered, and that the premises in controversy could not be subjected to the payment of the demand [*722] of a resident creditor except by a proceeding *in rem*; that is, by a direct proceeding against the property for that purpose. If these positions are sound, the ruling of the circuit court as to the invalidity of that judgment must be sustained, notwithstanding our dissent from the reasons upon which it was made. And that they are sound would seem to follow from two well-established principles of public law respecting the jurisdiction of an independent state over persons and property. The several states of the union are not, it is true, in every respect independent, many of the rights and powers which originally belonged to them being now vested in the government created by the constitution. But, except as restrained and limited by that instrument, they possess and exercise the authority of independent states, and the principles of public law to which we have referred are applicable to them. One of these principles is, that every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence, every state has the power to determine for itself the civil *status* and capacities of its inhabitants; to prescribe the subjects upon which they may contract, the forms and solemnities with which their contracts shall be executed, the rights and obligations arising from them, and the mode in which their validity shall be determined and their obligations enforced; and also to regulate the manner and conditions upon which property situated within such territory, both personal and real, may be acquired, enjoyed, and transferred. The other principle of public law referred to follows from the one mentioned; that is, that no state can exercise direct jurisdiction and authority over per-

sons or property without its territory. Story, *Confl. Laws*, c. 2; Wheat. *Int. Law*, pt. 2, c. 2. The several states are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one state have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions. "Any exertion of authority of this sort beyond this limit," says Story, "is a mere nullity, and incapable of binding [*723] such persons or property in any other tribunals." Story, *Confl. Laws*, § 539.

But as contracts made in one state may be enforceable only in another state, and property may be held by non-residents, the exercise of the jurisdiction which every state is admitted to possess over persons and property within its own territory will often affect persons and property without it. To any influence exerted in this way by a state affecting persons resident or property situated elsewhere, no objection can be justly taken; whilst any direct exertion of authority upon them, in an attempt to give extra-territorial operation to its laws, or to enforce an extra-territorial jurisdiction by its tribunals, would be deemed an encroachment upon the independence of the state in which the persons are domiciled or the property is situated, and be resisted as usurpation.

Thus the state, through its tribunals, may compel persons domiciled within its limits to execute, in pursuance of their contracts respecting property elsewhere situated, instruments in such form and with such solemnities as to transfer the title, so far as such formalities can be complied with; and the exercise of this jurisdiction in no manner interferes with the supreme control over the property by the state within which it is situated. *Penn v. Lord Baltimore*, 1 Ves. Sr. 444; *Masie v. Watts*, 6 Cranch. 148; *Watkins v. Holman*, 16 Pet. 25; *Corbett v. Nutt*, 10 Wall. 464.

So the state, through its tribunals, may subject property situated within its limits owned by non-residents to the payment of the demand of its own citizens against them; and the exercise of this jurisdiction in no respect infringes upon the sovereignty of

the state where the owners are domiciled. Every state owes protection to its own citizens; and, when non-residents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its citizens. It is in virtue of the state's jurisdiction over the property of the non-resident situated within its limits that its tribunals can inquire into that non-resident's obligations to its own citizens, and the inquiry can then be carried only to the extent necessary to control the disposition of the property. If the non-resident [*724] have no property in the state, there is nothing upon which the tribunals can adjudicate.

These views are not new. They have been frequently expressed, with more or less distinctness, in opinions of eminent judges, and have been carried into adjudications in numerous cases. Thus, in *Picquet v. Swan*, 5 Mason 35, Fed. Cas. No. 11,134, Mr. Justice Story said:—

“Where a party is within a territory, he may justly be subjected to its process, and bound personally by the judgment pronounced on such process against him. Where he is not within such territory, and is not personally subject to its laws, if, on account of his supposed or actual property being within the territory, process by the local laws may, by attachment, go to compel his appearance, and for his default to appear judgment may be pronounced against him, such a judgment must, upon general principles, be deemed only to bind him to the extent of such property, and cannot have the effect of a conclusive judgment *in personam*, for the plain reason, that, except so far as the property is concerned, it is a judgment *coram non judice*.”

And in *Boswell's Lessee v. Otis*, 9 How. 336, where the title of the plaintiff in ejectment was acquired on a sheriff's sale, under a money decree rendered upon publication of notice against non-residents, in a suit brought to enforce a contract relating to land, Mr. Justice McLean said:—

“Jurisdiction is acquired in one of two modes: first, as against the person of the defendant by the service of process; or, secondly, by a procedure against the property of the defendant within the jurisdiction of the court. In the latter case, the de-

fendant is not personally bound by the judgment beyond the property in question. And it is immaterial whether the proceeding against the property be by an attachment or a bill in chancery. It must be substantially a proceeding *in rem*."

These citations are not made as authoritative expositions of the law; for the language was perhaps not essential to the decision of the cases in which it was used, but as expressions of the opinion of eminent jurists. But in *Cooper v. Reynolds*, 77 U. S. (10 Wallace) 308, it was essential to the disposition of the case to declare the effect of a personal action against an absent party, without the jurisdiction of the court, not served [*725] with process or voluntarily submitting to the tribunal, when it was sought to subject his property to the payment of a demand of a resident complainant; and in the opinion there delivered we have a clear statement of the law as to the efficacy of such actions, and the jurisdiction of the court over them. * * * [*726] * * * [Here the court states the facts and quotes at length from the opinion in *Cooper v. Reynolds*. See ante p. 15.]

The fact that the defendants in that case had fled from the state, or had concealed themselves, so as not to be reached by the ordinary process of the court, and were not non-residents, was not made a point in the decision. The opinion treated them as being without the territorial jurisdiction of the court; and the grounds and extent of its authority over persons and property thus situated were considered, when they were not brought within its jurisdiction by personal service or voluntary appearance.

The writer of the present opinion considered that some of the objections to the preliminary proceedings in the attachment suit were well taken, and therefore dissented from the judgment of the court; but to the doctrine declared in the above citation he agreed, and he may add, that it received the approval of all the judges. It is the only doctrine consistent with proper protection to citizens of other states. If, without personal service, judgments *in personam*, obtained *ex parte* against non-residents and absent parties, upon mere publication of process, which, in the great majority of cases, would never be seen by the parties

interested, could be upheld and enforced, they would be the constant instruments of fraud and oppression. Judgments for all sorts of claims upon contracts and for torts, real or pretended, would be thus obtained, under which property would be seized, when the evidence of the transactions upon [*727] which they were founded, if they ever had any existence, had perished.

Substituted service by publication, or in any other authorized form, may be sufficient to inform parties that the object of proceedings taken where property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale. Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the state, or of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among different owners, or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings *in rem*. But where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely *in personam*, constructive service in this form upon a non-resident is ineffectual for any purpose. Process from the tribunals of one state cannot run into another state, and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the state where the tribunal sits cannot create any greater obligation upon the non-resident to appear. Process sent to him out of the state, and process published within it, are equally unavailing in proceedings to establish his personal liability.

The want of authority of the tribunals of a state to adjudicate upon the obligations of non-residents, where they have no property within its limits, is not denied by the court below; but the position is assumed, that, where they have property within the

state, it is immaterial whether the property is in the first instance brought under the control of the court by attachment or some other equivalent act, and afterwards applied by its judgment to the satisfaction of demands against its owner; or such demands be first established in a personal action, and [*728] the property of the non-resident be afterwards seized and sold on execution. But the answer to this position has already been given in the statement, that the jurisdiction of the court to inquire into and determine his obligations at all is only incidental to its jurisdiction over the property. Its jurisdiction in that respect cannot be made to depend upon facts to be ascertained after it has tried the cause and rendered the judgment. If the judgment be previously void, it will not become valid by the subsequent discovery of property of the defendant, or by his subsequent acquisition of it. The judgment, if void when rendered, will always remain void: it cannot occupy the doubtful position of being valid if property be found, and void if there be none. Even if the position assumed were confined to cases where the non-resident defendant possessed property in the state at the commencement of the action, it would still make the validity of the proceedings and judgment depend upon the question whether, before the levy of the execution, the defendant had or had not disposed of the property. If before the levy the property should be sold, then, according to this position, the judgment would not be binding. This doctrine would introduce a new element of uncertainty in judicial proceedings. The contrary is the law: the validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently. In *Webster v. Reid*, 11 Howard 437, the plaintiff claimed title to land sold under judgments recovered in suits brought in a territorial court of Iowa, upon publication of notice under a law of the territory, without service of process; and the court said:—

“These suits were not a proceeding *in rem* against the land, but were *in personam* against the owners of it. Whether they all resided within the territory or not does not appear, nor is it a matter of any importance. No person is required to answer in a suit on whom process has not been served, or whose prop-

erty has not been attached. In this case, there was no personal notice, nor an attachment or other proceeding against the land, until after the judgments. The judgments, therefore, are nullities, and did not authorize the executions on which the land was sold." [*729]

The force and effect of judgments rendered against non-residents without personal service of process upon them, or their voluntary appearance, have been the subject of frequent consideration in the courts of the United States, and of the several states, as attempts have been made to enforce such judgments in states other than those in which they were rendered, under the provision of the Constitution requiring that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state;" and the act of Congress providing for the mode of authenticating such acts, records, and proceedings, and declaring that, when thus authenticated, "they shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are or shall be taken." In the earlier cases, it was supposed that the act gave to all judgments the same effect in other states which they had by law in the state where rendered. But this view was afterwards qualified so as to make the act applicable only when the court rendering the judgment had jurisdiction of the parties and of the subject-matter, and not to preclude an inquiry into the jurisdiction of the court in which the judgment was rendered, or the right of the state itself to exercise authority over the person or the subject-matter. *M'Elmoyle v. Cohen*, 13 Pet. 312. In the case of *D'Arcy v. Ketchum*, reported in the 11th of Howard, this view is stated with great clearness. That was an action in the circuit court of the United States for Louisiana, brought upon a judgment rendered in New York under a state statute, against two joint debtors, only one of whom had been served with the process, the other being a non-resident of the state. The circuit court held the judgment conclusive and binding upon the non-resident not served with process; but this court reversed its decision, observing, that it was a familiar rule that countries for-

eign to our own disregarded a judgment merely against the person, where the defendant had not been served with process nor had a day in court; that national comity was never thus extended; that the proceeding was deemed an illegitimate assumption of power, and resisted as mere abuse; that no faith and credit or force and effect had been given to such judgments by any state of the union, so far [*730] as known; and that the state courts had uniformly, and in many instances, held them to be void. "The international law," said the court, "as it existed among the states in 1790, was that a judgment rendered in one state, assuming to bind the person of a citizen of another, was void within the foreign state when the defendant had not been served with process or voluntarily made defence; because neither the legislative jurisdiction nor that of courts of justice had binding force." And the court held that the act of Congress did not intend to declare a new rule, or to embrace judicial records of this description. As was stated in a subsequent case, the doctrine of this court is, that the act "was not designed to displace that principle of natural justice which requires a person to have notice of a suit before he can be conclusively bound by its result, nor those rules of public law which protect persons and property within one state from the exercise of jurisdiction over them by another." *The Lafayette Insurance Co. v. French et al.*, 18 How. 404.

This whole subject has been very fully and learnedly considered in the recent case of *Thompson v. Whitman*, 18 Wall. 457, where all the authorities are carefully reviewed and distinguished, and the conclusion above stated is not only reaffirmed, but the doctrine is asserted, that the record of a judgment rendered in another state may be contradicted as to the facts necessary to give the court jurisdiction against its recital of their existence. In all the cases brought in the state and federal courts, where attempts have been made under the act of Congress to give effect in one state to personal judgments rendered in another state against non-residents, without service upon them, or upon substituted service by publication, or in some other form, it has been held, without an exception, so far as we are aware, that such judgments were without any binding force, except as to prop-

erty, or interests in property, within the state, to reach and affect which was the object of the action in which the judgment was rendered, and which property was brought under control of the court in connection with the process against the person. The proceeding in such cases, though in the form of a personal action, has been uniformly treated, where service was not obtained, and the party did not voluntarily [*731] appear as effectual and binding merely as a proceeding *in rem*, and as having no operation beyond the disposition of the property, or some interest therein. And the reason assigned for this conclusion has been that which we have already stated, that the tribunals of one state have no jurisdiction over persons beyond its limits, and can enquire only into their obligations to its citizens when exercising its conceded jurisdiction over their property within its limits. In *Bissell v. Briggs*, 9 Mass. 462, decided by the supreme court of Massachusetts as early as 1813, the law is stated substantially in conformity with these views. In that case, the court considered at length the effect of the constitutional provision, and the act of Congress mentioned, and after stating that, in order to entitle the judgment rendered in any court of the United States to the full faith and credit mentioned in the Constitution, the court must have had jurisdiction not only of the cause, but of the parties, it proceeded to illustrate its position by observing, that, where a debtor living in one state has goods, effects, and credits in another, his creditor living in the other state may have the property attached pursuant to its laws, and, on recovering judgment, have the property applied to its satisfaction; and that the party in whose hands the property was would be protected by the judgment in the state of the debtor against a suit for it, because the court rendering the judgment had jurisdiction to that extent; but that if the property attached were insufficient to satisfy the judgment, and the creditor should sue on that judgment in the state of the debtor, he would fail, because the defendant was not amenable to the court rendering the judgment. In other words, it was held that over the property within the state the court had jurisdiction by the attachment, but had none over his person; and that any determination of his liability, except so far as was necessary for the disposition of the property, was invalid.

In *Kilbourn v. Woodworth*, 5 Johns. (N. Y.) 37, an action of debt was brought in New York upon a personal judgment recovered in Massachusetts. The defendant in that judgment was not served with process; and the suit was commenced by the attachment of a bedstead belonging to the defendant, accompanied with a summons to appear, served on his wife after she had left her place in Massachusetts. The court held that [*732] the attachment bound only the property attached as a proceeding *in rem*, and that it could not bind the defendant, observing, that to bind a defendant personally, when he was never personally summoned or had notice of the proceeding, would be contrary to the first principles of justice, repeating the language in that respect of Chief Justice DeGrey, used in the case of *Fisher v. Lane*, 3 Wils. 297, in 1772. See also *Borden v. Fitch*, 15 Johns. (N. Y.) 121, and the cases there cited, and *Harris v. Hardeman et al.*, 14 How. 334. To the same purport decisions are found in all the state courts. In several of the cases, the decision has been accompanied with the observation that a personal judgment thus recovered has no binding force without the state in which it is rendered, implying that in such state it may be valid and binding. But if the court has no jurisdiction over the person of the defendant by reason of his non-residence, and, consequently, no authority to pass upon his personal rights and obligations; if the whole proceeding, without service upon him or his appearance, is *coram non judice* and void; if to hold a defendant bound by such a judgment is contrary to the first principles of justice,—it is difficult to see how the judgment can legitimately have any force within the state. The language used can be justified only on the ground that there was no mode of directly reviewing such judgment or impeaching its validity within the state where rendered; and that, therefore, it could be called in question only when its enforcement was elsewhere attempted. In later cases, this language is repeated with less frequency than formerly, it beginning to be considered, as it always ought to have been, that a judgment which can be treated in any state of this union as contrary to the first principles of justice, and as an absolute nullity, because rendered without any jurisdiction of the tribunal over the party, is not entitled to any respect in

the state where rendered. *Smith v. McCutcheon*, 38 Mo. 415; *Darrance v. Preston*, 18 Iowa, 396; *Hakes v. Shupe*, 27 id. 465; *Mitchell's Administrator v. Gray*, 18 Ind. 123.

Be that as it may, the courts of the United States are not required to give effect to judgments of this character when any rights are claimed under them. Whilst they are not foreign tribunals in their relations to the state courts, they are tribunals [*733] of a different sovereignty, exercising a distinct and independent jurisdiction, and are bound to give to the judgments of the state courts only the same faith and credit which the courts of another state are bound to give to them.

Since the adoption of the fourteenth amendment to the federal constitution, the validity of such judgments may be directly questioned, and their enforcement in the state resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law. Whatever difficulty may be experienced in giving to those terms a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or his voluntary appearance.

Except in cases affecting the personal *status* of the plaintiff, and cases in which that mode of service may be considered to have been assented to in advance, as hereinafter mentioned, the substituted service of process by publication, allowed by the law of Oregon and by similar laws in other states, where actions are brought against non-residents, is effectual only where, in connection with process against the person for commencing the action, property in

the state is brought under the control of the court, and subjected to its disposition by process adapted to that purpose, or where the judgment is sought as a means of reaching such property or affecting some interest therein; in other words, where the action is in the nature of a proceeding *in rem*. As stated by Cooley in his treatise on Constitutional Limitations, 405, for any other purpose than to subject the property of a non-resident to valid claims against [*734] him in the state, "due process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered."

It is true that, in a strict sense, a proceeding *in rem* is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants; but, in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in the state, they are substantially proceedings *in rem* in the broader sense which we have mentioned.

It is hardly necessary to observe, that in all we have said we have had reference to proceedings in courts of first instance, and to their jurisdiction, and not to proceedings in an appellate tribunal to review the action of such courts. The latter may be taken upon such notice, personal or constructive, as the state creating the tribunal may provide. They are considered as rather a continuation of the original litigation than the commencement of a new action. *Nations et al. v. Johnson et al.*, 24 How. 195.

It follows from the views expressed that the personal judgment recovered in the state court of Oregon against the plaintiff herein, then a non-resident of the state, was without any validity, and did not authorize a sale of the property in controversy.

To prevent any misapplication of the views expressed in this opinion, it is proper to observe that we do not mean to assert, by any thing we have said, that a state may not authorize proceedings to determine the *status* of one of its citizens towards a non-

resident, which would be binding within the state, though made without service of process or personal notice to the non-resident. The jurisdiction which every state possesses to determine the civil *status* and capacities of all its inhabitants involves authority to prescribe the conditions on which proceedings affecting them may be commenced and carried on within its territory. The state, for example, has absolute [*735] right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved. One of the parties guilty of acts for which, by the law of the state, a dissolution may be granted, may have removed to a state where no dissolution is permitted. The complaining party would, therefore, fail if a divorce were sought in the state of the defendant; and if application could not be made to the tribunals of the complainant's domicile in such case, and proceedings be there instituted without personal service of process or personal notice to the offending party, the injured citizen would be without redress. Bish. Marr. and Div., § 156,

Neither do we mean to assert that a state may not require a non-resident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the state to receive service of process and notice in legal proceedings instituted with respect to such partnership, association, or contracts, or to designate a place where such service may be made and notice given, and provide, upon their failure, to make such appointment or to designate such place that service may be made upon a public officer designated for that purpose, or in some other prescribed way, and that judgments rendered upon such service may not be binding upon the non-residents both within and without the state. As was said by the court of exchequer in *Vallee v. Dumergue*, 4 Exch. 290, "It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed, even though he may not have actual notice of them." See also *The Lafayette Insurance Co. v. French et al.*, 18 How. 404, and *Gillespie v. Commercial Mutual Marine Insurance Co.*,

12 Gray (Mass.), 201. Nor do we doubt that a state, on creating corporations or other institutions for pecuniary or charitable purposes, may provide a mode in which their conduct may be investigated, their obligations enforced, or their charters revoked, which shall require other than personal service upon their officers or members. Parties becoming members of such corporations or institutions would hold their [*736] interest subject to the conditions prescribed by law. *Copin v. Adamson*, Law Rep., 9 Ex. 345.

In the present case, there is no feature of this kind, and, consequently, no consideration of what would be the effect of such legislation in enforcing the contract of a non-resident can arise. The question here respects only the validity of a money judgment rendered in one state, in an action upon a simple contract against the resident of another, without service of process upon him, or his appearance therein.

Judgment affirmed.

Hunt, J., dissenting. I am compelled to dissent from the opinion and judgment of the court, and, deeming the question involved to be important, I take leave to record my views upon it. * * *

The judgment of this court is based upon the theory that the legislature had no power to pass the law in question; that the principle of the statute is vicious, and every proceeding under it void. It, therefore, affects all like cases, past and future, and in every state. * * * [*737]

The result of the authorities on the subject, and the sound conclusions to be drawn from the principles which should govern the decision, as I shall endeavor to show, are these:—

1. A sovereign state must necessarily have such control over the real and personal property actually being within its limits, as that it may subject the same to the payment of debts justly due to its citizens.

2. This result is not altered by the circumstance that the owner of the property is non-resident, and so absent from the state that legal process cannot be served upon him personally.

3. Personal notice of a proceeding by which title to property is passed is not indispensable; it is competent to the state to authorize substituted service by publication or otherwise, as the

commencement of a suit against non-residents, the judgment in which will authorize the sale of property in such state.

4. It belongs to the legislative power of the state to determine what shall be the modes and means proper to be adopted to give notice to an absent defendant of the commencement of a suit; and if they are such as are reasonably likely to communicate to him information of the proceeding against him, and are in good faith designed to give him such information, and an opportunity to defend is provided for him in the event of his appearance in the suit, it is not competent to the judiciary to declare that such proceeding is void as not being by due process of law.

5. Whether the property of such non-resident shall be seized [*738] upon attachment as the commencement of a suit which shall be carried into judgment and execution, upon which it shall then be sold, or whether it shall be sold upon an execution and judgment without such preliminary seizure, is a matter not of constitutional power, but of municipal regulation only.

To say that a sovereign state has the power to ordain that the property of non-residents within its territory may be subjected to the payment of debts due to its citizens, if the property is levied upon at the commencement of a suit, but that it has not such power if the property is levied upon at the end of the suit, is a refinement and a depreciation of a great general principle that, in my judgment, cannot be sustained. * * *

LINDLEY v. O'REILLY.

50 New Jersey Law 636, 7 Am. St. Rep. 802, 15 Atl. 379. (1888)

Specific Enforcement in Equity—Land in Another State—Collateral Attack.

Ejectment by Catherine O'Reilly against David Lindley for land in Atlantic county. From judgment in favor of plaintiff, defendant brings error. Reversed.

Thomas B. Harned and D. J. Pancoast for plaintiff in error.

Peter L. Voorhees and James H. O'Reilly, contra.

The Court by Depue, J. Patrick O'Reilly died in 1881. In his lifetime he was seized of a tract of land in the county of Atlantic, in this state, the subject of controversy in this suit. By his

will, dated December 5th, 1877, proved before the surrogate of Atlantic county July 5th, 1881, and letters testamentary granted thereon, he devised his entire estate to the plaintiff, his wife, for life. Exception was taken to the admission of a certified copy of this will, but the printed case does not contain a full copy of the will, nor does any assignment of error touch the competency of this evidence. It must be assumed that this will was duly executed to devise lands under the laws of this state, and that the same was duly probated to make a certified copy competent evidence. On this presentation of title, the plaintiff would have been entitled to a verdict.

The obstacle in the way of the plaintiff's recovering, in virtue of her title under her husband's will, arose from a deed made by O'Reilly and wife to one Henry Francis Felix, on the 14th of January, 1861. This deed purported to be an absolute conveyance, in fee simple, for the consideration of \$18,000. To sustain title under her husband's will, it was necessary for the plaintiff to overcome or extinguish the legal title thus conveyed.

The plaintiff contended, at the trial, that the deed to Felix was, in fact, a mortgage, and that the debt or liability for which it was given was paid and satisfied, and that on the discharge of the obligation for which the conveyance was made, the estate of the mortgagee was extinguished. In a trial at [*639] law it is not competent to show, by oral testimony, that an absolute deed was, in reality, a mortgage. In our judicial system, the jurisdiction to convert an absolute deed into a mortgage, by parol evidence, is exclusively in the equity courts. The competency and effect of the evidence produced by the plaintiff for this purpose, are the issues raised by the bill of exceptions and assignments of error.

Felix died in 1866. By his will he gave all his property for the benefit of his wife, Alicia Kate, and a charitable society known as the Sisters of the Immaculate Heart of Mary, and made the Right Reverend James F. Wood, Roman Catholic Bishop of Philadelphia, executor.

Felix, at the time of his death, resided at Reading, in the county of Berks, Pennsylvania. On the 4th of December, 1867, O'Reilly filed a bill of equity in the court of common pleas of the county

of Berks, against the Right Reverend James F. Wood, executor of the last will and testament of Henry F. Felix, Alicia Kate Felix, widow of said Henry F. Felix, and the religious order of the Sisters of the Immaculate Heart of Mary.

The bill set out, that the Right Reverend James F. Wood was a resident of Philadelphia, that Alicia Kate Felix resided in Reading, and that the religious order of the Sisters of the Immaculate Heart of Mary was a society established in Reading. It charged that the deed of conveyance made by O'Reilly to Felix was, in legal effect, a mortgage; that the same was made as security to indemnify Felix against his liability on certain promissory notes made by O'Reilly and endorsed by Felix, and discounted by the Farmers' Bank of Reading, and under protest, and that, subsequently, the said notes were fully paid and satisfied by the said O'Reilly; that the said Felix sustained no loss or damage in consequence of the said endorsements, and prayed a reconveyance of the legal title. The defendants named in the bill appeared and filed an answer. By consent of parties an examiner was appointed January 27th, 1868, who filed his report November 1st, 1869, and in September, 1880, the case was brought on for hearing, by consent, [*640] on the bill, answer and report of the examiner; and on the 20th of September, 1880, a decree was signed, in which, after reciting that the court being satisfied that the allegations of the plaintiff's bill were correct and true, and that all the notes endorsed by Felix, and liabilities incurred by him for O'Reilly, had been, by O'Reilly, fully paid, discharged and satisfied, it was ordered and decreed that the Right Reverend James F. Wood, executor of the last will and testament of deceased, should execute and deliver to Patrick O'Reilly, a deed of reconveyance of the premises in fee simple.

All the parties to the suit resided in Pennsylvania. The Pennsylvania court had jurisdiction of the parties and also of the subject-matter of the suit. The contested problem is the effect of its decree upon the title to lands in this state. If the decree can affect the title to lands in this state, it extinguished the Felix title without a reconveyance, for in this state a mortgage is regarded as a mere security for the debt or liability for which it is given, and payment or satisfaction of the debt or liability discharges the mort-

gage, and revests the mortgaged premises in the mortgagor without a reconveyance. *Shields v. Lozean*, 5 Vroom 496; *Kloepping v. Stellmacher*, 7 Id. 176; *Jackson v. Terrell*, 10 Id. 329; *Schalk v. Kingsley*, 13 Id. 32.

Ever since *Penn v. Lord Baltimore*, 1 Ves. Sr., 444, it has been established law that in cases of contract, trust or fraud, the equity courts of one state or country, having jurisdiction of the parties, are competent to entertain a suit for specific performance, or to establish a trust, or for a conveyance, although the contract, trust or fraudulent title pertains to lands in another state or country. The principle upon which this jurisdiction rests is, that chancery, acting *in personam* and not *in rem*, holds the conscience of the parties bound without regard to the *situs* of the property. It is a jurisdiction that arises when a special equity can be shown which forms a ground for compelling a party to convey or release, or for restraining him from asserting a title or right in lands so situated, and is strictly limited to those cases in which the relief [*641] decreed can be obtained through the party's personal obedience. If it went beyond that the assumption of jurisdiction would not only be presumptuous but ineffectual. Westlake on International Law, 57, 58. The decree in a suit of this aspect imposes a mere personal obligation, enforceable by injunction, attachment, or like process, against the person, and cannot operate *ex proprio vigore* upon lands in another jurisdiction to create, transfer or vest a title. The cases on this subject are numerous. They are collected in the note to *Penn v. Lord Baltimore*, 2 Lead. Cas. in Eq. 1806, (1047). Brett's Lead. Cas. in Eq. 254; *Ewing v. Orr Ewing*, 9 App. Cas. 34; *Norris v. Chambres*, 29 Beav. 246; *Massie v. Watts*, 6 Cranch 148; *Wood v. Warner*, 2 McCarthy (D. C.) 81; *Vaughan v. Barkley*, 6 Wharton (Pa.) 392. In *Davis v. Headley*, 7 C. E. Gr. 115, the complainant obtained a decree in the circuit court of Kentucky against Headley, that a conveyance of lands in New Jersey, made by the complainant, should be rescinded and set aside, the possession restored and the defendant enjoined from setting up the conveyance. He then filed a bill in the court of chancery of this state to enforce the decree. The jurisdiction of the parties and of the subject-matter of that suit was undisputed. The bill to

enforce the decree was nevertheless dismissed. Chancellor Zabris-
kie, in dismissing the bill, declared that it was a well settled prin-
ciple of law in the decisions of England and of this country, and
acquiesced in by the jurists of all civilized nations, that immovable
property is exclusively subject to the laws and jurisdiction of the
courts of the state or nation in which it is located, and that no other
laws or courts could affect it. He added, "I find no case in which
a statute, judgment or proceeding in one country has been held to
affect such property in another country or beyond the jurisdiction
of the sovereign or court making the decree." After referring to
Penn v. Lord Baltimore, and the cases in which decrees for specific
performance of contracts relating to lands without their jurisdic-
tion were made, the learned chancellor said, "But in these cases
it is admitted, as it was by Lord Hardicke, that these [*642] decrees
could not affect the land, but could only be enforced where the court
had jurisdiction of the person of the defendant and thus compel
him to execute the conveyance. *In such cases it is the conveyance
and not the decree that has the effect.*"

A similar precedent in the federal courts enforced the same
view. *Watts v. Waddle et al.*, 1 McLean 200; s. c. on appeal, 6
Peters 389. Lands situate in Ohio were covered by two patents,
one issued to Powell and the other to Watts. To remove this cloud
upon his title, Watts commenced a suit against Powell's heirs in
the circuit court for the district of Kentucky, and obtained a
decree sustaining his title. The court had jurisdiction of the par-
ties. By the decree the defendants were required to convey the
premises to the complainant. A statute of Kentucky authorized
the court, in case the defendant in such a suit failed to convey, to
appoint a commissioner to make conveyance. By the decree a
commissioner was appointed, and, no conveyance having been made
by the parties, a deed was executed by the commissioner. A suit
afterwards brought in the federal circuit court of Ohio, brought
in question the effect of the decree of the Kentucky court, and of
the commissioner's deed in execution of it, upon the title to the
lands. The court held that neither the decree nor the commission-
er's deed vested the legal title in the complainant. In the opinion
in the supreme court, Mr. Justice McLean said: "The most

decisive objection to the decree against Powell's heirs is, that it does not vest the legal title in Watts. A decree cannot operate beyond the state in which the jurisdiction is exercised. It is not in the power of one state to prescribe the mode by which real property shall be conveyed in another. This principle is too clear to admit of doubt."

These cases rest upon the rule, which is firmly established, that the courts of one state or county are without jurisdiction over title to lands in another state or county. The clause of the federal constitution which requires full faith and credit to be given in each state to the records and judicial proceedings of every other state, is subordinate to this rule, and applies to [*643] the records and proceedings of the courts only so far as they have jurisdiction. *Public Works v. Columbia College*, 17 Wall. 521; *Watts v. Waddle*, 6 Peters 389; *Brine v. Ins. Co.*, 96 U. S. 627, 635; *Davis v. Headley*, 7 C. E. Gr. 115, 121; *Nelson v. Potter*, 50 N. J. L. 324.

The Pennsylvania court having no jurisdiction over title to lands in this state, its decree, though conclusive within the jurisdiction which pronounced it, cannot be allowed to affect the title to these lands. It could not, therefore, operate to convert the deed to Felix into a mortgage, and then decree it a satisfied encumbrance. For this reason, as well as another which will be presently stated, the decree did not extinguish the Felix title.

The plaintiff also offered in evidence a deed made by Wood to Patrick O'Reilly, dated October 16th, 1869, whereby the premises in suit were reconveyed to O'Reilly. This deed was made pending the equity suit, after the evidence in that suit was taken, and before final decree. It sets out the substance of O'Reilly's bill, as to the nature and purpose of his deed to Felix, and the payment and discharge by O'Reilly of the debt or liability to secure which the deed was given, and recites that the grantor is satisfied that the allegations in the bill are true, and in formal words it reconveys the premises to O'Reilly in fee. * * * [*650] * * *

To complete the chain of title from Felix it was necessary for the plaintiff to show title in Wood, and this could be done only by proof of the Felix will. A copy of this will, certified by the register of probate of the county of Berks, authenticated in the

manner prescribed by the act of Congress, was filed and recorded in the office of the surrogate of Atlantic county, April [*651] 11th. 1882, and a transcript of that record, certified by the surrogate, was produced and received in evidence as proof of the will. * * * [*652] * * * It did not in any way appear before the surrogate that the will had been admitted to probate [*653] in Pennsylvania, except by the affidavit of an attorney-at-law practicing in that state, that the said will had been duly proved and admitted to probate, as well as recorded in the office of the register of wills of Berks county. This affidavit was not competent to establish that fact.

The probate of a will is a judicial act, to be proven by a sworn or duly certified copy of the record, or at least by the certificate of the officer before whom the probate is made. And where the object of making such a will a record in this state is for the purpose of making title to lands, the record exemplified from another state must contain the proofs taken upon the probate, that it may appear by such proofs that the will was made and executed in the manner and with the formalities prescribed by the statute of this state for devises of lands. Without such proofs, the record, however authenticated, is not even *prima facie* evidence of title to lands. *Allaire v. Allaire*, 8 Vroom 312; s. c. Id. 113; *Nelson v. Potter*, 50, N. J. L. 324.

The court erred in admitting the transcript of the will in evidence, and in directing a verdict for the plaintiff. For these reasons the judgment should be

Reversed.

CHICAGO, ROCK ISLAND & PAC. RY. CO. v. STURM.

174 United States 710. (1898)

Garnishment—Situs—Jurisdiction of Res—Exemption—Claim—Procedure—Constitutional Law—Full Faith and Credit.

Action commenced in justice court in Belleville, Republic county, Kansas, by E. H. Sturm, the head of a family and a resident of Kansas, against the Chicago, R. I. & P. Ry. Co., a corporation under the laws of the states of Illinois and Iowa, and doing business in Kansas, to recover \$140, due the plaintiff for wages earned and payable in Kansas, and there exempt from liability for his debts. From judgment for plaintiff for \$140, interest and costs,

defendant appealed to the district court of said county. When the case was called for trial in the district court the defendant moved for a continuance on the ground that, before this action was commenced, A. H. Willard of Iowa had sued Sturm before a justice of the peace in Pottawattomie county, Iowa, and duly attached the wages sued for in this action by summoning this defendant as garnishee and serving said Sturm by publication only; that thereafter said justice had rendered judgment against Sturm and this defendant as his garnishee for \$95; and that this defendant had appealed from said judgment to the district court of said county, where said action was still pending. This motion being denied, defendant set up the same facts by way of answer, attaching a duly certified copy of the Iowa proceedings. Sturm replied by claiming his exemption, and on trial judgment was given in his favor as before. Defendant then moved for a new trial on the ground that full faith and credit had not been given to the Iowa proceedings as required by Sec. 1, Art. 4, of the United States Constitution. This motion being denied, the judgment was affirmed by the court of appeals on error (5 Kan. App. 427, 49 Pac. 337), and on error to the supreme court of the state was again affirmed: 58 Kan. 818. The defendant now brings the case here by writ of error. Reversed.

W. F. Evans and M. A. Low for plaintiff in error.

No appearance for defendant in error.

The Court by McKenna, J. How proceedings in garnishment may be availed of in defence—whether in abatement or bar of the suit on the debt attached or for a continuance of it or suspension of execution—the practice of the states of the union is not uniform. But it is obvious and necessary justice that such proceedings should be allowed as a defence in some way.

In the pending suit plaintiff in error moved for a continuance, and not securing it pleaded the proceedings in garnishment in answer. Judgment, however, was rendered against it, and sustained by the supreme court, on the authority of *Missouri Pacific Railway Company v. Sharitt*, 43 Kansas 375, and “for the reason stated by Mr. Justice Valentine in that case.”

The facts of that case were as follows: The Missouri Pacific Railway Company was indebted to Sharitt for services performed

in Kansas. Sharitt was indebted to one J. P. Stewart, a resident of Missouri. Stewart sued him in Missouri, and attached his wages in the hands of the railway company, and the latter answered in the suit in accordance with the order of garnishment on the 28th of July, 1887, admitting indebtedness, and on the 29th of September was ordered to pay its amount into court. On the 27th of July Sharitt brought an action in Kansas against the railway company to recover for his services, and the company in defense pleaded the garnishment and order of the Missouri court. The amount due Sharitt having been for wages, was exempt from attachment in Kansas. It was held that the garnishment was not a defence. The facts were similar therefore to those of the case at bar.

The ground of the opinion of Mr. Justice Valentine was [*714] that the Missouri court had no jurisdiction because the *situs* of the debt was in Kansas. In other words, and to quote the language of the learned justice, "the *situs* of a debt is either with the owner thereof, or at his domicile; or where the debt is to be paid; and it cannot be subjected to a proceeding in garnishment anywhere else. * * * It is not the debtor who can carry or transfer or transport the property in a debt from one state or jurisdiction into another. The *situs* of the property in a debt can be changed only by the change of location of the creditor who is the owner thereof, or with his consent."

The primary proposition is that the *situs* of a debt is at the domicile of a creditor, or, to state it negatively, it is not at the domicile of the debtor.

The proposition is supported by some cases; it is opposed by others. Its error proceeds, as we conceive, from confounding debt and credit, rights and remedies. The right of a creditor and the obligation of a debtor are correlative but different things, and the law in adapting its remedies for or against either must regard that difference. Of this there are many illustrations, and a proper and accurate attention to it avoids misunderstanding. This court said by Mr. Justice Gray in *Wyman v. Halstead*, 109 U. S. 654, 656: "The general rule of law is well settled, that for the purpose of founding administration all simple contract debts are assets at the

domicile of the debtor." And this is not because of defective title in the creditor or in his administrator, but because the policy of the state of the debtor requires it to protect home creditors. *Wilkins v. Ellett*, 9 Wall. 740; 108 U. S. 256. Debts cannot be assets at the domicile of the debtor if their locality is fixed at the domicile of the creditor, and if the policy of the state of the debtor can protect home creditors through administration proceedings, the same policy can protect home creditors through attachment proceedings.

For illustrations in matters of taxation, see *Kirtland v. Hotchkiss*, 100 U. S. 491; *Pullman's Car Co. v. Pennsylvania*, 141 U. S. 18; *Savings and Loan Society v. Multnomah County*, 169 U. S. 421.

Our attachment laws had their origin in the custom of [*715] London. Drake, § 1. Under it a debt was regarded as being where the debtor was, and questions of jurisdiction were settled on that regard. In *Andrews v. Clerke* (1689), 1 Carth. 25, Lord Chief Justice Holt summarily decided such a question, and stated the practice under the custom of London. The report of the case is brief, and is as follows:

"Andrews levied a plaint in the sheriff's court in London and, upon the usual suggestion that one T. S. (the garnishee) was debtor to the defendant, a foreign attachment was awarded to attach that debt in the hands of T. S., which was accordingly done; and then a *diletur* was entered, which is in nature of an imparlance in that court.

"Afterwards T. S. (the garnishee) pleaded to the jurisdiction setting forth that the cause of debt due from him to the defendant Sir Robert Clerke, and the contract on which it was founded, did arise, and was made at H. in the county of Middlesex, *extra jurisdictionem curiae*; and this plea being overruled, it was now moved (in behalf of T. S., the garnishee,) for a prohibition to the sheriff's court aforesaid, suggesting the said matter, (viz.) that the cause of action did arise *extra jurisdictionem*, etc., but the prohibition was denied because the debt always follows the person of the debtor, and it is not material where it was contracted, especially as to this purpose of foreign attachments; for it was always the custom in London to attach debts upon bills of exchange, and goldsmith's

notes, etc., if the goldsmith who gave the note on the person to whom the bill is directed, liveth within the city without any respect had to the place where the debt was contracted."

The idea of locality of things which may be said to be intangible is somewhat confusing, but if it be kept up the right of the creditor and the obligation of the debtor cannot have the same, unless debtor and creditor live in the same place. But we do not think it is necessary to resort to the idea at all or to give it important distinction. The essential service of foreign attachment laws is to reach and arrest the payment of what is due and might be paid to a non-resident to the defeat of his creditors. To do it he must go to the [*716] domicile of his debtor, and can only do it under the laws and procedure in force there. This is a legal necessity, and considerations of *situs* are somewhat artificial. If not artificial, whatever of substance there is must be with the debtor. He and he only has something in his hands. That something is the *res*, and gives character to the action as one in the nature of a proceeding *in rem*. *Mooney v. Buford & George Mfg. Co.*, 72 Fed. Rep. 32; Story on Conflict of Laws, § 549, and notes.

To ignore this is to give immunity to debts owed to non-resident creditors from attachment by their creditors, and to deny necessary remedies. A debt may be as valuable as tangible things. It is not capable of manual seizure, as they are, but no more than they can it be appropriated by attachment without process and the power to execute the process. A notice to the debtor must be given, and can only be given and enforced where he is. This, as we have already said, is a necessity, and it cannot be evaded by the insistence upon fictions or refinements about *situs* or the rights of the creditor. Of course, the debt is the property of the creditor, and because it is, the law seeks to subject it, as it does other property, to the payment of *his* creditors. If it can be done in any other way than by process against and jurisdiction of his debtor, that way does not occur to us.

Besides the proposition which we have discussed there are involved in the decision of the Sharitt case the propositions that a debt may have a *situs* where it is payable, and that it cannot be made migratory by the debtor. The latter was probably expressed as a consequence of the primary proposition and does not require

separate consideration. Besides there is no fact of change of domicile in the case. The plaintiff in error was not temporarily in Iowa. It was an Iowa corporation and a resident of the state, and was such at the time the debt sued on was contracted, and we are not concerned to inquire whether the cases which decide that a debtor temporarily in a state cannot be garnished there, are or are not justified by principle.

The proposition that the *situs* of a debt is where it is to be paid, is indefinite. "All debts are payable everywhere, unless [*717] there be some special limitation or provision in respect to the payment; the rule being that debts as such have no *locus* or *situs*, but accompany the creditor everywhere, and authorize a demand upon the debtor everywhere." 2 Parsons on Contracts, 8th edition, 702. The debt involved in the pending case had no "special limitation or provision in respect to payment." It was payable generally and could have been sued on in Iowa, and therefore was attachable in Iowa. This is the principle and effect of the best considered cases—the inevitable effect from the nature of transitory actions and the purpose of foreign attachment laws if we would enforce that purpose. *Embree v. Hanna*, 5 Johns. 101; *Hull v. Blake*, 13 Mass. 153; *Blake v. Williams*, 6 Pick. 286; *Harwell v. Sharp*, 85 Georgia, 124; *Harvey v. Great Northern Railway Co.*, 50 Minnesota, 405; *Mahany v. Kephart*, 15 W. Va. 609; *Leiber v. Railroad Co.*, 49 Iowa, 688; *National Fire Ins. Co. v. Chambers*, 53 N. J. Eq. 468; *Pomeroy v. Rand, McNally & Co.*, 157 Illinois 176; *Berry Bros. v. Nelson, Davis & Co.*, 77 Texas 191; *Weyth Hardware Co. v. Lang*, 127 Missouri 242; *Howland v. Chicago, Rock Island &c. Railway*, 134 Missouri 474; *Holland v. Mobile & O. R. R.*, 84 Tennessee 414.

Mr. Justice Valentine also expressed the view that "if a debt is exempt from a judicial process in the state where it is created, the exemption will follow the debt as an incident thereto into any other state or jurisdiction into which the debt may be supposed to be carried." For this he cites some cases.

It is not clear whether the learned justice considered that the doctrine affected the jurisdiction of the Iowa courts or was but an incident of the law of *situs* as expressed by him. If the latter, it has been answered by what we have already said. If the former,

it cannot be sustained. It may have been error for the Iowa court to have ruled against the doctrine, but the error did not destroy jurisdiction. *Howland v. Chicago R. I. & P. Ry. Co.*, 134 Missouri 474.

But we do not assent to the proposition. Exemption laws are not a part of the contract; they are part of the remedy and subject to the law of the forum. Freeman on Executions, § 209, and cases cited; also *Mineral Point Railroad v. Barron*, [*718] 83 Illinois 365; *Carson v. Railway Co.*, 88 Tennessee 646; *Couley v. Chilcote*, 25 Ohio St. 320; *Albrecht v. Treitschke*, 17 Nebraska 205; *O'Connor v. Walter*, 37 Nebraska 267; *Chicago, Burlington &c. Railroad v. Moore*, 31 Nebraska 629; *Moore v. Chicago, Rock Island &c. Railroad*, 43 Iowa, 385; *Broadstreet v. Clark, D. & C. M. & St. P. Railroad, Garnishee*, 65 Iowa 670; *Stevens v. Brown*, 5 West Virginia 450. See also *Bank of United States v. Donnally*, 8 Pet. 361; *Wilcox v. Hunt*, 13 Pet. 378; *Townsend v. Jemison*, 9 How. 407; *Walworth v. Harris*, 129 U. S. 365; *Penfield v. Chesapeake, Ohio &c. Railroad*, 134 U. S. 351. As to the extent to which *lex fori* governs, see Story on Conflict of Laws, 571 *et seq.*

There are cases for and cases against the proposition that it is the duty of a garnishee to notify the defendant, his creditor, of the pendency of the proceedings, and also to make the defence of exemption, or he will be precluded from claiming the proceedings in defence of an action against himself. We need not comment on the cases or reconcile them, as such notice was given and the defence was made. The plaintiff in error did all it could and submitted only to the demands of the law.

In *Broadstreet v. Clark*, 65 Iowa 670, the supreme court of the state decided that exemption laws pertained to the remedy and were not a defence in that state. This ruling is repeated in *Willard v. Sturm*, 96 Iowa 555, and applied to the proceedings in garnishment now under review.

It follows from these views that the Iowa court had jurisdiction, and that the Kansas courts did not give to the proceedings in Iowa the faith and credit they had there, and were hence entitled to in Kansas.

The judgment is reversed and the case remanded for further proceedings not inconsistent with this opinion.

II. KINDS OF JUDGMENTS.

Under this head prepare again upon *Locke v. Hubbard*, ante. 9; *Cooper v. Reynolds*, ante. 15; *Wells v. American Express Co.*, ante. 31; *Parsons v. Parsons*, ante. 34; *Windsor v. McVeigh*, ante. 38; *Pennoyer v. Neff*, ante. 48; *Lindley v. O'Reilly*, ante. 65; and, *Chicago R. I. & P. Ry. Co. v. Sturm*, ante. 71.

III. THE RECORD OF THE JUDGMENT.

1. FORM AND ESSENTIALS OF THE RECORD.

Under this head prepare again upon *Wells v. American Express Co.*, ante, 31; and *Jasper v. Schlessinger*, ante, 3.

ROBERTS v. CONNELLEE.
71 Texas 11, 8 S. W. 626. (1888)

Right to Execution When Not Expressly Awarded—Other Special Order—Form of Justice Court Records.

Action by John C. Roberts against C. U. Connellee to quiet title to land. Judgment for defendant. Plaintiff appeals. Reversed.

Plaintiff claims by deed from the heirs of M. J. Hall. Defendant claims under a sheriff's deed given at a sale on execution, on a judgment rendered by a justice of the peace against the executor of said Hall.

J. M. Moore and *James C. Walker*, for appellant.

No brief for appellee.

The Court by Collard, J. * * * Plaintiff insists that no execution could issue upon the judgment rendered by the justice of the peace, because it does not direct execution to issue, but, on the contrary, directs that the claim be paid in due course of administration. The judgment was rendered July 12, 1875; the alias execution was issued November 14, 1879. We do not understand that a justice of the peace must award execution as a part of the judgment in order to authorize its issuance under the laws in force at the time the judgment was rendered. The execution was issued as a consequence of the judgment, as a ministerial act, to enforce the judgment. There was no provision of the law of 1870, in force at the time the judgment was rendered, requiring the award of execution to be made in the judgment. The act of 1870, upon the subject of final process upon judgments in general, is: "And every justice shall, from time to time, when required by a party having a judgment in his court, issue such executions or other writs as may be necessary to enforce such judgments until the same shall have been satisfied." Pas. Dig., § 6340. This plainly indicates that the writ follows the judgment already rendered, as a matter of course. Even in a suit for specific articles, if the plaintiff recover, the statute directs that "judgment shall be rendered for the specific articles if to be had, but if not, then for their value;" here the judgment ends, and to enforce it the statute proceeds: "and the justice shall issue thereon his writ, directed to some lawful officer, commanding him to put the plaintiff in possession of the article or articles so recovered, if to be found, but if not, then to proceed to make the value of such article or articles, with legal interest from the date of the judgment and costs, as under execution." Pas. Dig. § 6340.

It is certainly the rule that an execution must be authorized by and must conform to the judgment; that there must be a judgment for costs, for instance, to authorize the clerk to issue execution for them. *Criswell v. Ragsdale*, 18 Texas, 445. But there was no law in this state at the date of this judgment requiring the court to award execution as a judicial act in a simple [*18] judgment for debt. Our statutes simply directed that the clerks and justices of the peace shall, after judgment, after a time stipulated,

or upon the rising of the court issue execution. If the contrary were true, no judgment would be final without an order that execution issue. It has been held in this state that an entry by the justice of the peace on his docket of the amount sued for, and that "the defendant came forward and acknowledged judgment;" giving the date, was as a final judgment. *Wahrenberger v. Horan*, 18 Texas, 59. The docket entries of a justice of the peace, styling the suit, amount of debt, and the following: "April 28. Offset, proved and allowed for \$20.50. Decree for balance, \$70.50," were held sufficient as a judgment. *Howerton v. Luckie*, 18 Id., 236. An entry of a verdict on a docket of a justice of the peace was treated as sufficient entry of judgment. *Davis v. Pinckney*, 20 Texas, 341.

In the case of *Clay v. Clay*, 7 Texas, 251, the justice entered upon his docket opposite the verdict: "Judgment rendered April 17, 1849." This was held sufficient as a judgment in a justice court. The supreme court, in commenting upon it, say: "The entry of judgment is informal and defective, and does not pursue the directions of the statute; but great liberality and indulgence are extended to the proceedings of justices of the peace who are not supposed to be skilled in the forms of judicial proceedings observed in courts of record. If their proceedings are intelligible and attain the ends of substantial justice they are generally sustained. See *Freeman on Judgments*, § 55 and note. We conclude that the judgment of the justice of the peace in the case before us was a final judgment, notwithstanding it failed to award execution, that an execution would follow as a consequence of the judgment and would run against the property of the estate in the hands of the executor Hall. The fact that the judgment required the claim should be paid in due course of administration is immaterial. There was no administration in the probate court, and the judgment could not be so collected. Such being the case, it was collectible [*19] by execution as allowed by law in case where the executor controls the estate and executes the will independently of the court. The Revised Statutes of this state, which took effect September 1, 1879, require that a judgment of justice of the peace shall direct the issuance of such process as may be necessary to

carry the judgment into execution." Rev. Stats., 1613. The judgment in the case before us is not affected by the recent statute, notwithstanding it was enacted before the execution was issued. The statute quoted is directory only of judgments to be thereafter rendered.

Other errors assigned need not be noticed further, as they are incidentally disposed of in our conclusions above stated. On account of errors of the court in admitting illegal evidence we conclude the cause should be reversed and remanded for a new trial.

Reversed and remanded.

2. ENTERING AND AMENDING THE RECORD.

Under this head prepare again upon *Jasper v. Schlessinger* and *Mayer*, ante. 3; *Brightman & Co. v. Merriwether*, ante. 8; and, *Locke v. Hubbard*, ante. 9.

BALCH & WIFE v. SHAW.

61 Massachusetts (7 Cushing) 282. (1851)

Judicial Records—Amendment—Evidence—Notice—Jurisdiction—Collateral Attack.

Writ of entry, dated Aug. 25, 1849, by Benjamin L. Blach and wife in this court against Robt. G. Shaw. Case reserved. Judgment for the tenant.

Demandants claimed in right of the wife as heir of John Tilley. The tenant relied on a record of the court of common pleas showing a sale to him by the executors of Tilley by order of that court, at the October term, 1824. Demandants objected to the record because it was not made up and entered at large till 1838; and then without sufficient record to make it up from, without notice, on the petition of an improper person, that the clerk had no power to make up the record then, and that the record as made up was not true.

L. Gale for the demandants.

E. Blake for the tenant.

The Court by Fletcher, J. This is a writ of entry. The demandants claim in right of the wife as heir of John Tilley, The tenant claims under a sale by the executors of John Tilley, by vir-

tue of a license of the court of common pleas. To make out his title, the tenant produced a record of the court of common pleas. The case turns, therefore, upon the question whether the record was rightfully amended, so that the tenant can maintain his title on that record.

There can be no doubt that it is competent for a court of record, under its general, inherent, and necessary authority, to correct the mistakes and supply the defect of its clerk or recording officer, so as to have the record conform to the actual facts and truth of the case, and that this may be done at any time as well after as during the term, *nunc pro tunc*. The length of time in this case, between granting the license and making up the record, does not take away the right or jurisdiction of the court. The authorities upon this point are numerous and conclusive. This was not a case of want of jurisdiction, in which the record cannot be amended, because, there being an omission to act, there is nothing to record; in such case, the defect is not in the record, but in the action of the court.

It was further said in argument, that there was not sufficient material from which to make up the record. But the court of common pleas, having the exclusive right and jurisdiction in the matter, were the proper judges of the necessity and propriety of extending the record, and of the proofs and of the sufficiency of the proofs upon which to proceed. Such a record, when made up, is conclusive, until altered or set aside by the same or some other court having jurisdiction, but it cannot be drawn in question collaterally when such record is used or relied upon in support of a title.

It was further said, that the extended record was invalid, because made without notice. But this was not a case for [*285] notice. Surely a court of record need not give notice to all the world to come in and show cause why it should not make its record conform to the truth of the case. Any party, who supposes he can show such cause, should apply to the court to have the record set aside or expunged, after it is made.

Then as to the objection that the record was extended upon the application of Vinal, who was not interested in the premises demanded in this suit. If he had an interest in the demanded premises, or if he had no interest, it would not be material. The court

might amend their records upon their own motion, or upon the motion or suggestion of any one interested. It is not a proceeding in which there need be any parties. It is the act of the court itself, correcting its own records, to make them conform to the truth of the case.

These general views will render it unnecessary to consider particularly some other ingenious arguments which were offered by the counsel for the demandant. The court being of opinion that there was a sufficient record of the order of the court of common pleas to sell the premises conveyed to Jones, there must be
Judgment for the tenant.

3. CONCLUSIVENESS OF THE RECORD.

MICHEL'S v. STORK.

52 Michigan 260, 17 N. W. 833. (1883)

Judicial Records—Officer's Return—Presumption of Verity—Collateral Attack.

Trover by Henry Stork against Jacob Michels in the Superior Court of Detroit. From judgment for plaintiff defendant brings error. Reversed.

W. B. Jackson and Conely, Maybury & Lucking for appellant.
Browse T. Prentis for appellee.

Cooley, J. The only question important to the decision of this case is, whether an officer's return of service of process is conclusive upon the parties to the suit in which the process issued, when brought in question in some collateral suit or proceeding.

Michels, it appears, on August 10, 1874, procured an attachment from a justice of the peace against the chattels of Stork, and put it into the hands of Constable John Gnau for service. The constable made return that by virtue of the writ he did, on the 10th day of August, 1874, seize the goods and chattels of the defendant mentioned in the inventory annexed thereto, and that on the 12th day of August, 1874, he served upon the defendant a copy of the writ and inventory, duly certified by him, by leaving the same at his usual place of abode with his wife, a person of [*261] suitable

age and discretion, whom he informed of its contents. What further was done in the attachment suit does not appear.

The present action is trover for the conversion of the property which the constable returned that he had attached. The plaintiff claims that the constable did not attach the goods at all, but that the officer and the defendant together took them away, and that they were immediately left by the officer with the defendant, and plaintiff never saw them afterwards. * * *

The question in this court arises upon the following instructions of the trial judge: * * * [*262] * * *

"Now, you are to determine whether Mr. Gnau did really levy an attachment on that property or not. If he did, that ends the suits. You are to determine, in the second place, if he did not levy an attachment, whether he and Michels went there to get the goods into Michels's possession simply for that purpose, and not for the purpose of levying the attachment. If Michels thought that Gnau had attached the goods and Gnau had the proper papers to attach them—and for the purposes of this case I charge you that he did have—then Michels would not be responsible; that is, if he was acting in good faith in the transaction.

"You see the question is a very simple one. It all turns on whether Michels and Gnau went there for the purpose of levying that attachment or whether they went there for the purpose of giving Michels possession of those goods, without any regard to the attachment.

"I charge, as a matter of law, it makes no difference what the officer returned, so far as Michels was concerned." * * *

The purport of this instruction is, that the return is to be taken as *prima facie* evidence of the facts stated in it, [*263] but that it may be contradicted by parol evidence, and if the jury are convinced by such evidence that the return is untrue, they are at liberty to disregard it. And the jury in this case did disregard it, and gave judgment for the plaintiff, grounding their action upon a finding that no attachment had in fact ever been made.

Had the suit been brought against the officer for a false return, it is conceded that the plaintiff would have been at liberty to show the falsity of the return by any evidence fairly tending to show it.

He might do this also by affidavit on a motion in the same suit to set aside the return; and this is not an uncommon proceeding when the truth of the return is disputed. *Chapman v. Cumming*, 17 N. J. L. 11; *Carr v. Commercial Bank*, 16 Wis. 50; *Bond v. Wilson*, 8 Kan. 228, 12 Am. Rep. 466. It has also been held that the officer's return may be contradicted in equity in a proceeding instituted to set aside a judgment founded upon it. *Owens v. Ranstead*, 22 Ill. 161; *Norcomb v. Dervey*, 27 Iowa 381; *Bridgeport Savings Bank v. Eldredge*, 28 Conn. 556; *Bell v. Williams*, 38 Tenn. (1 Head) 229; *Ridgeway v. Bank of Tennessee*, 30 Tenn. (11 Humph.) 523. See *Fowler v. Lee*, 10 G. & J. (Md.) 358, 32 Am. Dec. 172; *Leftwick v. Hamilton*, 9 Heisk. 310. It is also held that the officer's return is not conclusive as to facts stated therein which he must learn by inquiry of others; as, for example, that the person upon whom the process was served was the incumbent of a certain corporate office, such as that of president of a bank. *St. John v. Tombeckbee Bank*, 3 Stew. (Ala.) 146; *Rowe v. Table &c. Co.*, 10 Cal. 441; *Wilson v. Spring &c. Co.*, 10 Cal. 445. See *Chapman v. Cumming*, 17 N. J. L. 11; *Sanford v. Nichols*, 14 Conn. 324; and compare *State v. O'Neill*, 4 Mo. 221. And a person not a party or privy to the proceeding in which the return is made, is never concluded by it from showing the real fact. *Nall v. Granger*, 8 Mich. 450. And where suit is brought upon a foreign judgment, it seems to be competent to disprove jurisdiction by showing, in contradiction of the officer's return, that no service was made upon the party defendant. [*264] *Knowles v. Gaslight &c. Co.* 86 U. S. (19 Wall.) 58; *Thompson v. Whitman*, 85 U. S. (18 Wall.) 457; *Carleton v. Bickford*, 79 Mass. (13 Gray) 591; *McDermott v. Clary*, 107 Mass. 501; *Gilman v. Gilman*, 126 Mass. 26, 30 Am. Rep. 646; *Bowler v. Huston*, 30 Grat. (Va.) 266, 32 Am. Rep. 673; *Lowe v. Lowe*, 40 Iowa 220.

None of these cases are analogous to the one before us; but it must be conceded that there are cases which are directly in point, and which tend to support the instructions. *Cunningham v. Mitchell*, (Va.) 4 Rand. 189; *Butts v. Francis*, 4 Conn. 424; *Watson v. Watson*, 6 Conn. 334; *Hutchins v. Johnson*, 12 Conn. 376; *Smith v. Law*, 27 N. Car. (5 Ired. L.) 197; *Joyner v. Miller*, 55

Miss. 208; *Abell v. Simon*, 49 Md. 318; *Gary v. State*, 11 Tex. App. 527; *Dasher v. Dasher*, 47 Ga. 320; *Elder v. Cozart*, 59 Ga. 199; *Jones v. Commercial Bank*, 6 Miss. (5 How.) 43, 35 Am. Dec. 419. The Georgia cases appear to be based upon a statute. If it were important now to examine the other cases critically, some of them might perhaps be distinguished, but their tendency is unquestionably as above stated.

On the other hand, the ruling of this court in *Green v. Kindy*, 43 Mich. 279, is distinctly adverse to the instructions. It was there held that the return of a sheriff to a writ of replevin, in which he certified that the plaintiff in the suit had not filed a forthcoming bond, was conclusive upon the parties, and would preclude any such bond being set up. This case, which seems to have been overlooked on the trial, is in entire accord with the English authorities. *Anonymous*, Lofft 372; *Bentley v. Hore*, 1 Lev. 86; *Flud. v. Pennington*, Cro. Eliz. 872; *Rev. v. Elkins*, 4 Burr. 2129; *Harrington v. Taylor*, 15 East 378; *Goubot v. De Crouy*, 2 Dowl. P. C. 86. But it is also in accord with the great preponderance of authority in this country. In New York the doctrine was strongly asserted in a case in which a constable had served his own process, which the law of that state allowed. "The constable's return," says the court, "is conclusive against the defendant in the cause in which it is made. He cannot traverse the truth of it by a plea in [*265] abatement or otherwise; but if it be false, the defendant's remedy is in an action against the constable for a false return." See *Allen v. Martin*, 10 Wend. 300; *Boomer v. Laine*, 10 Wend. 525. In Pennsylvania it was said in an early case: "It is a well-settled principle, applicable to every case, that credence is to be given to the sheriff's return; so much so, that there can be no averment against it in the same action. A party may make an averment consistent with the sheriff's return, or explanatory of its legal bearing and effect, where the return is at large; but he cannot aver a matter directly at variance with the facts stated in return, and contradictory to it, and showing it to be false. If a party be injured by the false return of the sheriff, his remedy is by action on the case against the sheriff who makes it." *Knowles v. Lord*, 4 Whart. 500; s. c. 34 Am. Dec. 525. Like decisions were made

in *Zion Church v. St. Peter's*, 5 W. & S. 215; *Diller v. Roberts*, 13 S. & R. 60; and the doctrine is recognized in *Parson's Appeal*, 49 Penn. St. 195. It has also been distinctly and strongly affirmed in Massachusetts cases. *Slayton v. Chester*, 4 Mass. 478; *Bott v. Burnell*, 11 Mass. 163; *Winchell v. Stiles*, 15 Mass. 230; *Bean v. Parker*, 17 Mass. 591; *Campbell v. Webster*, 81 Mass. (15 Gray) 28; *Dooley v. Wolcott*, 86 Mass. (4 Allen) 406. In New Hampshire it is said: "As between the parties, the return of the sheriff is conclusive upon all matters material to be returned; and cannot be contradicted by such parties or their privies, or by bail, endorsers, or others, whose rights or liabilities are dependent upon the suit. The remedy for a false return is by suit against the sheriff, and not by defeating the proceedings in which such return is made." *Bolles v. Bowen*, 45 N. H. 124, following *Brown v. Davis*, 9 N. H. 76; *Wendell v. Mugridge*, 19 N. H. 109; *Angier v. Ash*, 26 N. H. 99; *Messer v. Bailey*, 31 N. H. 9; *Clough v. Monroe*, 34 N. H. 381. To the same purport are the Kentucky cases. *Trigg v. Lewis's Ex'rs.*, 13 Ky. (3 Litt.) 129; *Smith v. Hornback*, 10 Ky. (3 A. K. Marsh.) 379. In Vermont and Maine the cases in Massachusetts have been followed with approval. *Eastman v. Curtis*, 4 Vt. 616; *Swift v. Cobb*, 10 Vt. 282; [*266] *Wood v. Doane*, 20 Vt. 612; *Stratton v. Lyons*, 53 Vt. 130; *Gilson v. Parkhurst*, 53 Vt. 384; *Stinson v. Snow*, 10 Me. 263; *Fairfield v. Paine*, 23 Me. 498, 41 Am. Dec. 357. The decisions in Indiana are to the same effect. *Rorvell v. Klein*, 44 Ind. 290; *Splahn v. Gillespie*, 48 Ind. 397; *Stockton v. Stockton*, 59 Ind. 574; *Clark v. Shaw*, 79 Ind. 164. So are those in North Carolina, Arkansas, Minnesota, and Nebraska. *Hunter v. Kirk*, 11 N. Car. (4 Hawks) 277; *Rose v. Ford*, 2 Ark. 26; *Tullis v. Brawley*, 3 Minn. 277, Gil. 195; *Johnson v. Jones*, 2 Neb. 126. In Illinois the English rule has been recognized: *Fitzgerald v. Kimball*, 86 Ill. 396; though it is said some exceptions are made to it in the furtherance of justice in that state. *Ryan v. Lander*, 89 Ill. 554. What the exceptions are is not pointed out in that case; but in the subsequent case of *Hunter v. Stoneburner*, 92 Ill. 75, 79, we have the following statement as the result of prior decisions: "It is in rare cases only, that the return of the officer can be contradicted, except in a direct proceeding by

suit against the officer for a false return. In all other cases, almost without an exception, the return is held to be conclusive. An exception to the rule is, where some other portion of the record in the same case contradicts the return, but it cannot be done by evidence dehors the record."

These citations are sufficient, and more than sufficient, to justify the previous ruling by this court. It follows that the instruction complained of was erroneous, and it must be reversed with costs and a new trial ordered.

Graves, C.J., and Sherwood, J., concurred.

Campbell, J., dissenting. As I understand the controversy in this case, the dispute was not whether the constable took the property, but whether the taking was not by process designed by the parties as a mere pretext for getting possession, and not for any legitimate purpose. The case is one of abuse of process for illegal purposes, in which it was claimed, and the jury must have found, that Michels was active throughout as connected with the constable. I do not [*267] understand that a fraudulent use of process to get possession of property, and for no other purpose is, under any circumstances, a justification to any person concerned in the fraud.

I think the court committed no error, and that the judgment should be affirmed.

FERGUSON v. CRAWFORD.

70 New York 253, 26 Am. Rep. 589. (1877)

Judgments, Domestic and Foreign—Record—Conclusiveness—Collateral Attack.

Foreclosure proceeding by Orson J. Ferguson against Stephen H. Crawford and others. From a judgment of the general term affirming a judgment in favor of defendants entered on trial at the special term plaintiff appeals. Reversed.

William F. Purdy, for the appellant.

Wilson Brown, Jr., for the respondents.

The Court by Rapallo, J. This action was brought to foreclose a mortgage, held by the plaintiff, on certain real estate in the county of Westchester. One of the defences was, that the rights

of the plaintiff, as mortgagee, had been barred by a judgment of foreclosure of a mortgage prior to his, in favor of one McFarquahar, covering the same premises, under which judgment the premises had been sold to the defendant [*255] Horton. It was alleged in the answer that the plaintiff was a defendant in the McFarquahar action, in which the judgment had been rendered, and appeared therein, by John W. Mills, as his attorney, but did not put in any answer.

On the trial of the present action, the defendants, in support of this defense, put in evidence the judgment-roll in the last-mentioned action, which roll contained a notice of appearance for the present plaintiff, and a consent that judgment be entered, purporting to be signed by Mills. The judgment was entered by default for want of an answer, and on this consent, and recited that the summons had been served on the defendants therein, and that none of them had appeared, except the present plaintiff, by John W. Mills, his attorney, and some others named in the judgment.

Thereupon the plaintiff called Mills as a witness, and offered to prove by him, 1st. That the signature to the notice of appearance and consent was a forgery; 2d. That Mills was never authorized to appear for the plaintiff; and 3d. That he never did appear for him.

No proof of service of the summons on the plaintiff is attached to or contained in that judgment-roll, and it appears to be conceded on the present argument, as matter of fact, that no such service was made. The defendants rely wholly upon the effect of the recital in the judgment and the notice of appearance contained in the judgment-roll, and claim that in a collateral action these import absolute verity and cannot be contradicted by extrinsic evidence.

They also claim that the case of *Brown v. Nichols*, 42 N. Y. 26, is decisive of this case. There a judgment had been recovered against a defendant who had not been served with process, but for whom an attorney had appeared without authority, and it was held by this court that the judgment could not be attacked on that ground for want of jurisdiction in a collateral proceeding.

That decision does not reach the present case. It is not founded upon any doctrine which precludes a party from showing,

as matter of fact, that he was never brought before [*256] the court, or appeared in it, but is based upon a long line of authority, which holds that when an attorney of the court appears for a party his appearance is recognized and his authority will be presumed to the extent, at least, of giving validity to the proceeding. That he is an officer of the court, amenable to it for misconduct, and to any party for whom he assumes to act without authority, for all damages occasioned by such action, and for reasons of public policy the court holds the appearance good, leaving the aggrieved party to his action for damages against the attorney, granting relief against the judgment, only in a direct application, and in case the attorney is shown to be irresponsible. *Denton v. Noyes*, 6 Johns. 296. This, however, is an entirely different case. The offer was not merely to show that the attorney was not authorized to appear, but that he did not in fact appear, and that the pretended appearance was a forgery.

None of the principles upon which the decisions in *Denton v. Noyes*, and *Brown v. Nichols* rest, can be applied to such a case. There is no act of any officer of the court which public policy requires should be recognized. There is no party against whom the innocent defendant can have redress. He is sought to be held bound by a judgment when he was never personally summoned or had notice of the proceeding, which result has been frequently declared to be contrary to the first principles of justice, and this is sought to be accomplished by means of a judgment entered upon forged papers. No principle of public policy requires or sanctions sustaining such a judgment. The only difficulty in the case arises upon the objection that the evidence offered tends to contradict the record, and from the adjudications which attach to the judgment of a court of general jurisdiction, a conclusive presumption of jurisdiction over the parties, which cannot be contradicted except by matter appearing on the face of the record itself.

It is an elementary principle recognized in all the cases that, to give binding effect to a judgment of any court, whether of general or limited jurisdiction, it is essential that [*257] the court should have jurisdiction of the person as well as the subject-matter, and that the want of jurisdiction over either may always be set

up against a judgment when sought to be enforced, or any benefit is claimed under it. There is no difference of opinion as to this general rule, but the point of difficulty is as to the manner in which this want of jurisdiction must be made to appear, in the case of a judgment of a domestic court of general jurisdiction, acting in the exercise of its general powers, when it comes in question in a collateral action: Whether, when the record is silent as to the steps taken to bring the parties into court, it may be proved by evidence that they were not legally summoned and did not appear; or whether, when the record recites that they were summoned or appeared, such recitals may be contradicted by extrinsic evidence; or whether the jurisdiction over the person and subject-matter is a presumption of law, which cannot be contradicted, unless it appears on the face of the record itself that there was a want of jurisdiction, as in cases where the record shows that the service of process was by publication or some other method than personal.

On these points there has been as much diversity of opinion, especially between the courts of this state and those of other states, as upon any general question which can be mentioned, although there has as yet been no authoritative adjudication in this state on the subject. It is well settled by our own decisions, that in the case of a judgment of a court of general jurisdiction of a sister state, although it is entitled to the benefit of the presumption of jurisdiction which exists in favor of a judgment of one of our own courts, yet the want of jurisdiction may be shown by extrinsic evidence, and that even a recital in the judgment record that the defendant was served with process, or appeared by attorney, or of any other jurisdictional fact, is not conclusive, but may be contradicted by extrinsic evidence. *Borden v. Fitch*, 15 John. 121; *Starbuck v. Murray*, 5 Wend. 148; *Shumway v. Stillman*, 6 Wend. 447; *Kerr v. Kerr*, 41 N. Y. 272; *Hoffman v. Hoffman*, 46 N. Y. 30. [*258]

And the same rule prevails in some of the other states in regard to the judgments of courts of sister states. Although some have held, even in regard to such a judgment, that if the record contains recitals showing jurisdiction, they cannot be contradicted.

Field v. Gibbs, 1 Peters C. C. R., 155 [Fed. Cas. No. 4,766]; *Roberts v. Caldwell*, 35 Ky. (5 Dana) 512; *Ewer v. Coffin*, 55 Mass. (1 Cush.) 23; *Rathbone v. Terry*, 1 R. I. 73; *Shelton v. Tiffin*, 6 How. (U. S.) 163, 186.

After considerable research, I have been unable to find a single authoritative adjudication, in this or any other state, deciding that in the case of a domestic judgment of a court of general jurisdiction, want of jurisdiction over the person may be shown by extrinsic evidence, while there are a great number of adjudications in neighboring states, holding that, in the case of such judgments, parties and privies are estopped in collateral actions to deny the jurisdiction of the court over the person as well as the subject-matter, unless it appear on the face of the record that the court had not acquired jurisdiction; and that in such cases there is a conclusive presumption of law that jurisdiction was acquired by service of process or the appearance of the party. The cases are very numerous, but the citation of a few of them will suffice.

In *Cook v. Darling*, 18 Pick. 393, in an action of debt on a domestic judgment, the defendant pleaded that, at the time of the supposed service upon him of the writ in the original action, he was not an inhabitant of the state of Massachusetts; that he had no notice of the action, and did not appear therein.

This plea was held bad on demurrer, on the ground that the judgment could not be impeached collaterally. In *Granger v. Clarke*, 22 Maine 128, also an action on a judgment, the plea was the same, with the addition that the judgment had been obtained by fraud; but it was held to constitute no defense. *Coit v. Haven* 30 Conn. 190, was a *scire facias* on a judgment, and the defendant pleaded that the writ in the original action was never served upon him, etc.; and the [*259] court held, in an elaborate opinion, that a judgment of a domestic court of general jurisdiction could not be attacked collaterally, unless the want of jurisdiction appeared upon the face of the record, and that jurisdictional facts, such as the service of the writ and the like, were conclusively presumed in favor of such a judgment, unless the record showed the contrary, although this rule did not apply to foreign judgments, or judgments of the courts of sister states, or to domestic judgments of

inferior courts, and that the only remedy in such a case was by writ of error or application to a court of equity.

The same rule is held in *Penobscot R. R. Co. v. Weeks*, 52 Maine 456; *Wingate v. Haywood*, 40 N. H. 437; *Clark v. Bryan*, 16 Md. 171; *Callen v. Ellison*, 13 Ohio St. 446; *Horner v. Doe*, 1 Ind. 131; *Wright v. Marsh*, 2 G. Greene (Iowa) 94; *Prince v. Griffin*, 16 Iowa 552, and in numerous other cases which are referred to in the case of *Hahn v. Kelly*, 34 Cal. 391, which adopts the same rule and contains a full and instructive discussion of the question.

There are many cases in other states, and in the courts of the United States, containing expressions general in their character, which would seem to sanction the doctrine that a want of jurisdiction over the person or subject-matter may in all cases be shown by extrinsic evidence, and they are sometimes cited as authorities to that effect. *Elliott v. Piersol*, 26 U. S. (1 Peters) 328, 340; *Hollingsworth v. Barbour*, 29 U. S. (4 Peters) 466; *Hickey v. Stewart*, 44 U. S. (3 How.) 750; *Shriver v. Lynn*, 43 U. S. (2 How.) 43; *Williamson v. Berry*, 49 U. S. (8 How.) 495; *same v. Ball*, *same* 566; *Enos v. Smith*, 15 Miss. (7 Sm. & M.) 85; *Campbell v. Brown*, 7 Miss. (6 How.) 106; *Shaefer v. Gates*, 41 Ky. (2 B. Mon.) 453; *Wilcox v. Jackson*, 38 U. S. (13 Peters) 498; *Miller v. Ewing*, 16 Miss. (8 Sm. & M.) 421, and numerous other cases not cited. But an examination of these cases discloses that they all relate either to judgments of inferior courts, or courts of limited jurisdiction, or courts of general jurisdiction acting in the exercise of special statutory powers, which proceedings stand on the [*260] same footing with those of courts of limited and inferior jurisdiction (3 N. Y. 511), or courts of sister states, or to cases where the want of jurisdiction appeared on the face of the record, or to cases of direct proceedings to reverse or set aside the judgment. I have not found one which adjudicated the point now under consideration, otherwise than those to which I have referred. There are some cases which hold that the want of authority of an attorney to appear may be shown by extrinsic evidence, although the record states that an attorney appeared for the party, but those are placed expressly on the ground that such evidence does not contradict the record.

Bodurtha v. Goodrich, 69 Mass. (3 Gray) 508; *Shelton v. Tiffin*, 47 U. S. (6 How.) 163, 186; *Harris v. Hardeman*, 55 U. S. (14 How.) 334, 340. Those cases are, however, in conflict with the decision of this court, in *Brown v. Nichols*, 42 N. Y. 26, and in many other cases.

The learned annotators of Smith's Leading Cases, Hare & Wallace, 1 Smith L. Cases, vol. 1, p. 842 (marg.) sum the matter up by saying: "Whatever the rule may be where the record is silent, it would seem clearly and conclusively established by a weight of authority too great for opposition, unless on the ground of local and peculiar law, that no one can contradict that which the record actually avers, and that a recital of notice or appearance, or a return of service by the sheriff in the record of a domestic court of general jurisdiction, is absolutely conclusive and cannot be disproved by extrinsic evidence."

It is quite remarkable, however, that notwithstanding the formidable array of authority in its favor, the courts of this state have never sustained this doctrine by any adjudication, but on the contrary the great weight of judicial opinion, and the views of some of our most distinguished jurists, are directly opposed to it.

As has been already stated, our courts have settled by adjudication in regard to judgments of sister states, that the question of jurisdiction may be inquired into, and a want of jurisdiction over the person shown by evidence, [*261] and have further decided (in opposition to the holding of courts of some of the other states) that this may be done, even if it involves the contradiction of a recital in the judgment record. In stating the reasons for this conclusion, our courts have founded it on general principles, quite as applicable to domestic judgments as to others, and save in one case, *Kerr v. Kerr*, 41 N. Y. 272, have in their opinions made no discrimination between them. *Borden v. Fitch*, 15 Johns. 121; *Starbuck v. Murray*, 5 Wend. 148; *Noyes v. Butler*, 6 Barb. 613, and cases cited.

When we come to consider the effect of these authorities, it is difficult to find any solid ground upon which to rest a distinction between domestic judgments and judgments of sister states in regard to this question, for under the provisions of the consti-

tution of the United States, which requires that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, it is now well settled that when a judgment of a court of a sister state is duly proved in a court of this state, it is entitled here to all the effect to which it is entitled in the courts of the state where rendered. If conclusive there it is equally conclusive in all the states of the union; and whatever pleas would be good to a suit thereon in the state where rendered, and none others can be pleaded in any court in the United States. *Hampton v. McConnel*, 16 U. S. (3 Wheaton) 234; Story Com. on Cons., § 183; *Mills v. Duryee*, 11 U. S. (7 Cranch) 481.

In holding, therefore, that a defense that the party was not served and did not appear, although the record stated that he did, was good, our courts must have held that such is the law of this state and the common law, and consequently, that in the absence of proof of any special law to the contrary in the state where the judgment was rendered, it must be presumed to be also the law of that state. The judgments of our courts can stand on no other logical basis. The distinction which is made in almost all the other states of the union between the effect of domestic judgments and judgments [*262] of sister states, in regard to the conclusiveness of the presumption of jurisdiction over the person, is sought to be explained, by saying that in regard to domestic judgments the party aggrieved can obtain relief by application to the court in which the judgment was rendered, or by writ of error, whereas in the case of a judgment rendered against him in another state he would be obliged to go into a foreign jurisdiction for redress, which would be a manifestly inadequate protection; and therefore the constitution may be construed so as to apply only where the persons affected by the judgment were within the operation of the proceeding. This explanation, however, does not remove the difficulty in making the distinction, for if there is a conclusive presumption that there was jurisdiction, that presumption must exist in one case as well as in the other. The question whether or not the party is estopped, cannot be made to depend upon the greater inconvenience of getting rid of the estoppel in one case than in another.

But aside from this observation as to the effect of the authori-

ties, an examination of them shows that our courts did in fact proceed upon a ground common to both classes of judgments. The reasons are fully stated in the case of *Starbuck v. Murray*, 5 Wend. 148. In that case, which was an action upon a Massachusetts judgment, the defendant pleaded that no process was served on him in the suit in which the judgment sued on was rendered, and that he never appeared therein in person or by attorney, and this plea was held good, notwithstanding that the record of the judgment stated that the defendant appeared to the suit. Marcy, J., in delivering the opinion of the court, and referring to the argument that the defendant was estopped from asserting anything against the allegation of his appearance contained in the record, says: "It appears to me that this proposition assumes the very fact to be established, which is the only question in issue. For what purpose does the defendant question the jurisdiction of the court? Solely to show that its proceedings and judgments are void, and therefore the supposed record is not [*263] in truth a record. If the defendant had not proper notice of, and did not appear to, the original action, all the state courts, with one exception, agree in opinion that the paper introduced, as to him, is no record. But if he cannot show even against the pretended record that fact, on the alleged ground of the uncontrollable verity of the record, he is deprived of his defense by a process of reasoning that is to my mind little less than sophistry. The plaintiff in effect declares to the defendant—the paper declared on, is a record, because it says you appeared; and you appeared, because the paper is a record. This is reasoning in a circle. The appearance makes the record uncontrollable verity, and the record makes the appearance an unimpeachable fact." And again, at p. 160, he says: "To say that the defendant may show the supposed record to be a nullity, by showing a want of jurisdiction in the court which made it, and at the same time to estop him from doing so because the court has inserted in the record an allegation which he offers to prove untrue, does not seem to me to be very consistent."

This is but an amplification of what is sometimes more briefly expressed in the books, that where the defence goes to defeat the record, there is no estoppel. That the reasoning of Marcy, J., is

applicable to domestic judgments, is also the opinion of the learned annotators to Phillip's Evidence. (Cowen & Hill's notes, 1st ed., p. 801, note 551.) Referring to the opinion of Marcy, J., before cited, they say: "The same may be said respecting any judgment, sentence or decree. A want of jurisdiction in the court pronouncing it may always be set up when it is sought to be enforced, or when any benefit is claimed under it; and the principle which ordinarily forbids the impeachment or contradiction of a record has no sort of application to the case." The dicta of our judges are all to the same effect, although the precise case does not seem to have arisen. In *Bigelow v. Stearns*, 19 Johns. 39, 41, Spencer, Ch. J., laid down the broad rule that if a court, whether of limited jurisdiction or not, undertakes to hold cognizance of a cause without having gained [*264] jurisdiction of the person by having him before them in the manner required by law, the proceedings are void. In *Latham v. Edgerton*, 9 Cow. 227, Sutherland, J., in regard to a judgment of a court of common pleas, says: "The principle that a record cannot be impeached by pleading, is not applicable to a case like this. The want of jurisdiction is a matter that may always be set up against a judgment when sought to be enforced or where any benefit is claimed under it." Citing *Mills v. Martin*, 19 Johns. 7, 33. He also says (p. 229): "The plaintiff below might have applied to the court to set aside their proceedings, but he was not bound to do so. He had a right to lie by until the judgment was set up against him, and then to show that the proceedings were void for want of jurisdiction." In *Davis v. Packard*, 6 Wend. 327, 332, in the court of errors, the chancellor, speaking of domestic judgments, says: "If the jurisdiction of the court is general or unlimited both as to parties and subject-matter, it will be presumed to have had jurisdiction of the cause unless it appears affirmatively from the record, or by the showing of the party denying the jurisdiction of the court, that some special circumstances existed to oust the court of its jurisdiction in that particular case." In *Bloom v. Burdick*, 1 Hill 130, Bronson, J., says: "The distinction between superior and inferior courts is not of much importance in this particular case, for whenever it appears that there was a want of jurisdiction, the judgment will be void in

whatever court it was rendered;" and in *People v. Cassels*, 5 Hill 164, 168, the same learned judge makes the remark, that no court or officer can acquire jurisdiction by the mere assertion of it, or by falsely alleging the existence of facts upon which jurisdiction depends. In *Harrington v. The People*, 6 Barb. 607, 610, Paige, J., expresses the opinion that the jurisdiction of a court, whether of general or limited jurisdiction, may be inquired into, although the record of the judgment states facts giving it jurisdiction. He repeats the same view in *Noyes v. Butler*, 6 Barb. 613, 617, and in *Hard v. Shipman*, [*265] 6 Barb. 621, 623, 624, where he says of superior as well as inferior courts, that the record is never conclusive as to the recital of a jurisdictional fact, and the defendant is always at liberty to show a want of jurisdiction, although the record avers the contrary. If the court had no jurisdiction, it had no power to make a record, and the supposed record is not in truth a record. Citing *Starbuck v. Murray*, 5 Wend. 158. The language of Gridley, J., in *Wright v. Douglass*, 10 Barb. 97, 111, is still more in point. He observes: "It is denied by counsel for the plaintiff, that want of jurisdiction can be shown collaterally to defeat a judgment of a court of general jurisdiction. The true rule, however, is that laid down in the opinion just cited (op. of Bronson, J., in *Bloom v. Burdick*, 1 Hill 138 to 143), that in a court of general jurisdiction, it is to be presumed that the court has jurisdiction till the contrary appears, but the want of jurisdiction may always be shown by evidence, except in one solitary case," viz: "When jurisdiction depends on a fact that is litigated in a suit, and is adjudged in favor of the party who avers jurisdiction, then the question of jurisdiction is judicially decided, and the judgment record is conclusive evidence of jurisdiction until set aside or reversed by a direct proceeding."

The general term, in that case, held that a judgment of the supreme court was void for want of service of an attachment, notwithstanding that the record averred that the attachment had been duly served and returned, according to law. The judgment in the case cited was reversed (7 N. Y. 564), but not upon the point referred to here. It cannot, however, be held to be an adjudication upon that point, because the judgment was not rendered in

the exercise of the general powers of the court, but in pursuance of a special statutory authority.

In the *Chemung Canal Bank v. Judson*, 8 N. Y. 254, the general principle is recognized, that the jurisdiction of any court exercising authority over a subject may be inquired into, and in *Adams v. The Saratoga & Washington R. R. Co.* [*266], 10 N. Y. 328, 333, Gridley, J., maintains as to the judgments of all courts, that jurisdiction may be inquired into, and disproved by evidence, notwithstanding recitals in the record, and says that such is the doctrine of the courts of this state, although it may be different in some of the other states, and perhaps also in England; and he says the idea is not to be tolerated, that the attorney could make up a record or decree, reciting that due notice was given to the defendant of a proceeding, when he never heard of it, and the decree held conclusive against an offer to show this vital allegation false. That was a case of special proceeding, and, therefore, not an authority on the point. In *Pendleton v. Weed*, 17 N. Y. 72, 75, where a judgment of the supreme court was sought to be attacked collaterally, it is said by Strong, J.: "It is undoubtedly true that the want of jurisdiction of the person is a good defense in answer to a judgment when set up for any purpose, and that such jurisdiction is open for inquiry," and by Comstock, J., at p. 77: "I assent to the doctrine that where there is no suit or process, appearance on confession, no valid judgment can be rendered in any court; that in such a case the recital in the record of jurisdictional facts is not conclusive." Citing *Starbuck v. Murray*. "I think it is always the right of a party against whom a record is set up, to show that no jurisdiction of his person was acquired, and consequently that there was no right or authority to make up the record against him." Selden and Pratt, JJ., concurred in these views, but the case was disposed of on a different point.

In *Porter v. Bronson*, 29 How. Pr. 292, and S. C. 19, Abb. Pr. 236, the court of common pleas of the city of New York held, at general term, that assuming the marine court to be a court of record, a defendant in an action on a judgment of that court might set up that he was not served with process and did not appear, notwithstanding recitals in the record showing jurisdiction; and

in *Bolton v. Jacks*, 6 Rob. 166, 198, Jones, J., says that it is now conceded, at least in this state, that want of jurisdiction will render void [*267] the judgment of any court, whether it be of superior or inferior, of general, limited or local jurisdiction, or of record or not, and that the bare recital of jurisdictional facts in the record of a judgment of any court, whether superior or inferior, of general or limited jurisdiction, is not conclusive, but only *prima facie* evidence of the truth of the fact recited, and the party against whom a judgment is offered, is not by the bare fact of such recitals estopped from showing, by affirmative proof, that they were untrue and thus rendering the judgment void for want of jurisdiction. He cites in support of this opinion, several of the cases which I have referred to, and *Dobson v. Pearce*, 12 N. Y. 156, and *Hatcher v. Rocheleau*, 18 N. Y. 86, 92.

It thus appears that the current of judicial opinion in this state is very strong and uniform in favor of the proposition stated by Jones, J., in 6 Rob. 198, and if adopted here, is decisive of the present case. It has not as yet, however, been directly adjudicated, and if sustained, it must rest upon the local law of this state, as it finds no support in adjudications elsewhere. There are reasons, however, founded upon our system of practice, which would warrant us in so holding. The powers of a court of equity being vested in our courts of law, and equitable defences being allowable, there is no reason why, to an action upon a judgment, the defendant should not be permitted to set up, by way of defense, any matter which would be ground of relief in equity against the judgment; and it is conceded in those states where the record is held conclusive, that when the judgment has been obtained by fraud, or without bringing the defendant into court, and the want of jurisdiction does not appear upon the face of the record, relief may be obtained in equity.

The technical difficulty arising from the conclusiveness of the record is thus obviated. In the present case, the judgment is set up by the defendants as a bar to the plaintiff's action. But it must be borne in mind, that this is an equitable action, being for the foreclosure of a mortgage. The [*268] defendants set up the foreclosure in the McFarquahar case as a bar, but being in a court

of equity, the plaintiff had a right to set up any matter showing that the defendants ought not in equity to avail themselves of that judgment. They offered to show that it was entered *ex parte* on forged papers. It does not appear that the plaintiff ever had any knowledge of it, and it is not pretended that he was legally summoned. Such a judgment would never be upheld in equity, even in favor of one ignorant of the fraud and claiming *bona fide* under it. He stands in no better position than any other party claiming *bona fide* under a forged instrument.

The case is analogous in principle to that of the *Bridgeport Savings Bank v. Eldredge*, 28 Conn. 556. That was a bill filed by a second mortgagee to redeem mortgaged premises from a first mortgagee. The first mortgagee had obtained a decree of foreclosure against the second mortgagee, and the time limited for redemption had expired. The record of the decree found the fact that legal service of the bill in the first suit had been made on the second mortgagee, but in fact none had been made, and he had no actual knowledge of the pendency of the suit until after the time limited for redemption had expired; and he would have redeemed if he had known of the decree.

It was held, 1. That the decree was not in any proper sense a bar to the present suit, as a judgment at law would be a bar to a suit at law; but that, without impugning the decree, the court could, for equitable reasons shown, allow a further time for redemption.

2. That, therefore, the question whether the plaintiff could contradict the record by showing that no service of the bill was, in fact, made upon him, did not present itself as a technical one, to be determined by the rules with regard to the verity of judicial records, but only in its relation to the plaintiff's rights to equitable relief, and therefore that evidence of want of notice was admissible.

The bill to redeem was not framed to open the former [*269] decree, and contained no allegations adapted to or praying for such relief, but was in the ordinary form of a bill for redemption, taking no notice of the previous decree. The decree was set up in the answer, and it was averred that it was rendered on legal notice to the plaintiff. The court, however, held that this defense might be rebutted by evidence of facts which should preclude defendants

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from taking advantage of a decree of which they could not conscientiously avail themselves.

Under the system of practice in this state, no reply to an answer setting up new matter is required, but the plaintiff is allowed to rebut it by evidence. Neither is it necessary to anticipate a defense arising upon a deed or record by inserting matter in the complaint in avoidance of it. The defense may never be set up, and the plaintiff is not bound to suppose that it will be. The state of the pleadings, therefore, presents no difficulty. The only question which might be raised is, that McFarquahar, in whose name the decree was obtained, should be before the court, but no such objection was made at the trial, and if it had been, I do not see that he has any interest in the question. All the parties claiming under the decree and sale are parties to this action, and I see no reason why the validity of the McFarquahar foreclosure cannot be tried herein as well as upon a motion or in a separate suit to set aside the decree.

The judgments should be reversed, and a new trial ordered with costs to abide the event.

All concur; *Andrews, J.*, in result.

Judgment reversed.

IV. AMENDING, VACATING, AND MODIFYING JUDGMENTS.

BRONSON v. SCHULTEN.

104 United States (14 Otto) 410. (1881)

Judgments—Opening and Amending—Jurisdiction—When Allowable.

Motion dated Dec. 27, 1876, in the circuit court for the southern district of New York, by J. W. Schulten et al., to vacate a judgment entered against Greene C. Bronson Aug. 5, 1860, for money paid under protest to him, as United States revenue collector for the port of New York, by the plaintiffs. From an order granting the motion Lucretia Bronson as executor of G. C. Bronson brings error. Reversed.

The *Solicitor-General* for the plaintiff.

S. Shellabarger, J. M. Wilson, and A. W. Griswold, contra.

The Court by Miller, J. * * * [*413] It appears that the original suit was commenced in one of the state courts, Sept. 2, 1858, and afterwards removed into the circuit court of the United States, where plaintiffs filed a declaration containing the common counts. It appears that they also served a bill of particulars, setting out seventy-four entries of goods at the custom house, on which they had been charged excessive duties by the defendant Bronson, which they had paid under protest. The affidavit of Murray, a refund clerk in the custom-house, states that in thirty-four of these entries the sums which should have been allowed plaintiffs were omitted in the adjustment. * * * [*414]

We have thus a case in which plaintiffs sue for excessive charges on account of these commissions paid on seventy-four entries of goods, specifically set out in their bill of particulars. A verdict is rendered in their favor fixing the precise error under which the excessive duty had been exacted, and leaving to a referee

to ascertain the amount due on each of these entries. The referee reports as to all but thirty-four, nearly half, of these entries, and as to them makes no report. A judgment is rendered in conformity to the report, the money paid and accepted, and seventeen years afterwards the judgment is opened to correct the omission of these thirty-four entries.

We are of opinion that, if there was any mistake in the report of the referee and in the judgment rendered thereon, it was so clearly due to the negligence and inattention of plaintiffs or their attorney, that no case is made for relief in any of the modes known to the law, of correcting an erroneous judgment after the term at which it was rendered.

Stress is laid upon the fact in argument that the referee was one of the clerks in the custom-house, who had access to all the books and papers of the office. It is probable he was selected by both parties because of his familiarity with those accounts, but he is not mentioned in the order of reference as such clerk or officer. Any other person so appointed would have been permitted to examine the necessary books and papers, and in this matter he must be held to be, as no doubt he was, an impartial referee, representing neither the collector nor the government which was to pay the sum found due.

The plaintiffs had the same right to appear before him, examine his report and the evidence on which it was founded, to take and urge to the court exceptions to it, as in case of any other reference. Nothing of the kind was done, and though it is here said that no report at all was made as to thirty-four out of seventy-four entries set out in plaintiffs' bill of particulars, no exception was made to the report on that ground, nor was any inquiry made as to the reason for such omission. It is [*415] obvious that if this had been done, the error which is now complained of would have been corrected before the report of the referee was confirmed and judgment rendered on it.

If, then, there was no question of lapse of time, or of the power of the court over its own judgments after the term at which they are rendered, and if this were a bill in chancery to set aside this judgment on the ground of mistake, it is clear that no relief could

be granted, because of the negligence, carelessness, and inattention and laches of the plaintiffs, or of their attorney, in the matter.

Does the power of the court over its own judgment, exercised in a summary manner on motion, after the term at which it was rendered, extend beyond this?

In this country all courts have terms and vacations. The time of the commencement of every term, if there be half a dozen a year, is fixed by statute, and the end of it by the final adjournment of the court for that term. This is the case with regard to all the courts of the United States, and if there be exceptions in the state courts, they are unimportant. It is a general rule of the law that all the judgments, decrees, or other orders of the courts, however conclusive in their character, are under control of the court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified, or annulled by that court.

But it is a rule equally well established, that after the term has ended all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them; and if errors exist, they can only be corrected by such proceeding by a writ of error or appeal as may be allowed in a court which, by law, can review the decision. So strongly has this principle been upheld by this court, that while realizing that there is no court which can review its decisions, it has invariably refused all applications for rehearing made after the adjournment of the court for the term at which the judgment was rendered. And this is placed upon the ground that the case has passed beyond the control of the court. *Brooks v. Railroad Company*, 102 U. S. 107; *Public Schools v. Walker*, [*416] 9 Wall. 603; *Brown v. Aspden*, 14 How. 25; *Cameron v. McRoberts*, 3 Wheat. 591; *Sibbald v. United States*, 12 Pet. 480; *United States v. The Brig Glamorgan*, 2 Curtis, C. C. 236; *Bradford v. Patterson*, 8 Ky. (1 A. K. Marsh.) 464; *Ballard v. Davis*, 26 Ky. (3 J. J. Marsh.) 656.

But to this general rule an exception has crept into practice in a large number of the state courts in a class of cases not well defined, and about which and about the limit of this exception these

courts are much at variance. An attempt to reconcile them would be entirely futile. The exception, however, has its foundation in the English writ of error *coram vobis*, a writ which was allowed to bring before the same court in which the error was committed some matter of fact which had escaped attention, and which was material in the proceeding. These were limited generally to the facts that one of the parties to the judgment had died before it was rendered, or was an infant and no guardian had appeared or been appointed, or was a *feme covert* and the like, or error in the process through the default of the clerk. See Archbold's Practice.

In Rolle's Abridgement, p. 749, it is said that if the error be in the judgment itself, a writ of error does not lie in the same, but in another and superior court.

In *Pickett's Heirs v. Legerwood*, 7 Pet. 144, this court said that the same end sought by that writ is now in practice generally attained by motion, sustained, if the court require it, by affidavits; and it was added, this latter mode had so far superseded the former in the British practice, that Blackstone did not even notice the writ as a remedy.

It is quite clear upon the examination of many cases of the exercise of this writ of error *coram vobis* found in the reported cases in this country, and as defined in the case in this court above-mentioned, and in England, that it does not reach to facts submitted to a jury, or found by a referee, or by the court sitting to try the issues; and therefore it does not include the present case.

There has grown up, however, in the courts of law a tendency to apply to this control over their own judgments some of the principles of the courts of equity in cases which go a little further in administering summary relief than the old-fashioned [*417] writ of error *coram vobis* did. This practice has been founded in the courts of many of the states on statutes which conferred a prescribed and limited control over the judgment of a court after the expiration of the term at which it was rendered. In other cases the summary remedy by motion has been granted as founded in the inherent power of the court over its own judgments, and to avoid the expense and delay of a formal suit in chancery. It can easily be seen how this practice is justified in courts of the states where

a system has been adopted which amalgamates the equitable and common-law jurisdiction in one form of action, as most of the rules of procedure do.

It is a profitless task to follow the research of counsel for the defendants in error through the numerous decisions of the state courts cited by them on this point in support of the action of the circuit court. The cases from the New York courts, which go farthest in that direction, are largely founded on the statute of that state, and we are of opinion that on this point neither the statute of that state nor the decisions of its courts are binding on the courts of the United States held there.

The question relates to the *power* of the courts and not to the mode of procedure. It is whether there exists in the court the authority to set aside, vacate, and modify its final judgments after the term at which they were rendered; and this authority can neither be conferred upon nor withheld from the courts of the United States by the statutes of a state or the practice of its courts.

We are also of opinion that the general current of authority in the courts of this country fixes the line beyond which they cannot go in setting aside their final judgments and decrees, on motion made after the term at which they were rendered, far within the case made out here. If it is an equitable power supposed to be here exercised, we have shown that a court of equity, on the most formal proceeding, taken in due time, could not, according to its established principles, have granted the relief which was given in this case.

It is also one of the principles of equity most frequently relied upon that the party seeking relief in a case like this [*418] must use due diligence in asserting his rights, and that negligence and laches in that regard are equally effectual bars to relief.

As we have already seen, nothing hindered the plaintiffs from discovering the mistake of which they complain for seventeen years but the most careless inattention to the proceeding in which they had claimed these rights and had them adjudicated.

There was here an acquiescence for that length of time in the correctness of a judgment which had been paid to them, when

the error, if any existed, only needed a comparison of their own bill of particulars with the report of the referee, to be seen, or at least to be suggested. Having been negligent originally, and having slept on their rights for many years, they show no right, under any sound practice of the control of courts over their own judgments, to have that in this case set aside.

It follows that the judgment of the circuit court must be reversed, with directions that the order vacating the former judgment be set aside, and the motion of plaintiffs in that matter be overruled.

So ordered.

V. THE EFFECT OF JUDGMENTS.

DUCHESS OF KINGSTON'S CASE.

April 15, 16, 19, 20, & 22, A. D. 1776; 16 George III.

Howell's State Trials, No. 551, folio ed. vol. 11, pp. 198-264, octavo ed. (1814), pp. 355-652; this opinion in folio at p. 265, in octavo at p. 535; reported in 2 Smith's Leading Cases, *424; see also, 1 Leach's Crown Cases 173, Ambler's Cases 756, 763.

Res Judicata — How Available — Matters Incidentally in Issue — Who Bound—Jurisdiction.

Trial by the House of Lords, for bigamy. Elizabeth, calling herself duchess dowager of Kingston, the defendant herein, was indicted at Hicks hall, Middlesex, at the general session in oyer and terminer, for that, being the lawful wife of Augustus John Hervey, now earl of Bristol, she feloniously married Evelyn Pierrepont, late duke of Kingston. She was granted a removal of the prosecution to the House of Lords, there to be tried; and Henry, Earl of Bathurst, chancellor, was specially appointed lord high steward to preside at the trial. Upon being arraigned before the assembled lords in Westminster hall, Monday, April 15, she pleaded not guilty, asked trial by her peers, and, without waiting for the attorney general to open the case for the prosecution, addressed the lords; saying, that she had brought a suit in the consistory court of the bishop of London against the said Hervey for boasting that they were married; to which he had appeared and affirmed his claim; and that by the sentence of said court it was decreed that she was free from all matrimonial contracts or espousals with the said Hervey; and that she was advised that the said decree, still in force and unimpeached, which she then asked leave to offer in evidence, was conclusive, and that no other evidence ought to be offered or stated respecting such pretended marriage. Thereupon the lords listened for three days to elaborate arguments on both sides by the ablest counsel in England as to the admissibility and effect of the

proposed evidence. The principal points argued were put in the form of two questions by Sir Francis Hargrave, who assisted the prosecution. After this profound argument the lords adjourned to the chamber of parliament to consider their decision, but without coming to any conclusion, entered the order given below, asking the opinion of the judges on said questions, returned to the court in Westminster hall, and proceeded with the trial while the judges were conferring upon the questions propounded.

Atty.-Gen. *Thurlow*, afterwards lord chancellor; Sol.-Gen. *Wedderburn*, afterwards successively lord chief justice of the common pleas and lord chancellor; Mr. *Dunning*, and Dr. *Harris* for the crown.

Mr. *Wallace*; Mr. *Mansfield*, afterwards lord chief justice of the common pleas; Dr. *Calvert*; and Dr. *Wynne*, for the prisoner.

Friday, April 19th, 1776. ORDERED by the lords spiritual and temporal in parliament assembled, that the following questions be put to the judges, viz. :—

1. Whether a sentence of the spiritual court against a marriage in a suit for jactitation of marriage is conclusive evidence so as to stop the counsel for the crown from proving the said marriage in an indictment for polygamy?

2. Whether, admitting such sentence to be conclusive upon such indictment, the counsel for the crown may be admitted to avoid the effect of such sentence, by proving the same to have been obtained by fraud or collusion?

Whereupon, the lord chief justice of the court of common pleas (Sir William De Grey, afterwards Lord Walsingham,) having conferred with the rest of the judges present, delivered their unanimous opinion upon the said questions, with his reasons, as follow, viz. :—

My Lords: My Lord Chief Baron (Sir Sidney Stafford Smythe) and the rest of my brethren, have desired me to deliver their answer to the questions your lordships have been pleased to propound to us.

That our opinion may be the better understood, it is necessary

to make some observations on what has passed in argument upon the subject.

What has been said at the bar is certainly true, as a general principle, that a transaction between two parties, in judicial proceedings, ought not to be binding upon a third; for it would be unjust to bind any person who could not be [*425] admitted to make a defence, or to examine witnesses, or to appeal from a judgment he might think erroneous; and therefore the deposition of witnesses in another cause in proof of a fact, the verdict of a jury finding the fact, and the judgment of the court upon facts found, although evidence against the parties, and all claiming under them, are not in general, to be used to the prejudice of strangers. There are some exceptions to this general rule, founded upon particular reasons, but not being applicable to the present subject, it is unnecessary to state them.

From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: first, that the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, conclusive, between the same parties, upon the same matter, directly in question in another court; secondly, that the judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court, for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment.

Upon the subject of marriage, the spiritual court has the sole and exclusive cognizance of questioning and deciding, directly, the legality of marriage; and of enforcing, specifically, the rights and obligations respecting persons depending upon it; but the temporal courts have the sole cognizance of examining and deciding upon all temporal rights of property; and, so far as such rights are concerned, they have the inherent power of deciding incidentally, either upon the fact, or the legality of marriage, where they lie in the way

to the decision of the proper objects of their jurisdiction; they do not want or require the aid of the spiritual courts; nor has the law provided any legal means of sending to them for their opinion; except where, in the case of marriage, an issue is joined upon the record in certain real writs, upon the legality of a marriage, or its immediate consequence, "general bastardy;" [*426] or, in like manner, in some other particular instances, lying peculiarly in the knowledge of their courts, as profession, deprivation, and some others; in these cases, upon the issue so formed, the mode of trying the question is by reference to the ordinary, and his certificate, when returned, received and entered upon the record in the temporal courts, is a perpetual and conclusive evidence against all the world upon that point; which exceptionable extent, on whatever reasons founded, was the occasion of the statute 9 Henry VI., requiring certain public proclamations to be made for persons interested to come in, and be parties to the proceeding. But, even in these cases, if the ordinary should return no certificate, or an insufficient one; or, if the issue is accompanied with any special circumstances, as if a second issue triable by a jury is formed upon the same record; or, if the effect of the same issue is put into another form, a jury is to decide, and not the ordinary to certify, the truth; and to this purpose Sir William Staunford mentions a remarkable instance. Bigamy was triable by the bishop's certificate; but if the prisoner, to avoid the charge, pleads that the second espousals were null and void, because he had a former wife living, this special bigamy was not to be tried by the bishop's certificate.

So that the trial of marriage, either as to legality, or fact, was not absolutely, and from its nature, an object, *alieni fori*.

There was a time when the spiritual courts wished that their determinations might in all cases be received as authentic in the temporal courts; and in that solemn assembly of the king, the peers, the bishops and judges, convened for the purpose of settling the demands of the church, by Edward II., one of the claims was expressed in these words: "*Si aliqua, causa, vel negotium, cujus cognito spectat ad forum ecclesiasticum, et coram ecclesiastico iudice fuerit sententialiter terminatum, et transierit in rem judicatam, nec per appellationem fuerit suspensum; et postmodum, coram*

judice seculari, super eadem re inter easdem personas questio moveatur, et provetur per testes vel instrumenta, talis exceptio in foro seculari non admittatur." The answer to which demand was expressed in this manner: "*Quando eadem causa, diversis rationibus coram iudicibus [*427] ecclesiasticis et secularibus, ventilatur, dicunt quod (non obstante ecclesiastico iudicio) curia regis ipsum tractet negotium, ut sibi expedire videtur.*" For which Lord Coke gives this reason, second Institute, c. 22: "For the spiritual judges' proceedings are for the correction of the spiritual inner man, and, '*pro salute animae,*' to enjoin him penance; and the judges of the common law proceed to give damages and recompense for the wrong and injury done;" and then adds, "and so this article was deservedly rejected."

And the same demand was made, and received the same answer, in the third year of James I.

It is to be observed, that this demand related only to civil suits between the same parties; and that the sentence should be received as a plea in bar. But this attempt and miscarriage did not prevent the temporal courts from showing the same respect to their proceedings as they did to those in other courts. And therefore where, in civil causes, they found the question of marriage directly determined by the ecclesiastical courts, they received the sentence, though not as a plea, yet as a proof of the fact; it being an authority accredited in a judicial proceeding by a court of competent jurisdiction; but still they received it upon the same principles, and subject to the same rules, by which they admit the acts of other courts.

Hence a sentence of nullity, and a sentence in affirmance of a marriage, have been received as conclusive evidence on a question of legitimacy arising incidentally upon a claim to a real estate. A sentence in a case of jactitation has been received upon a title in ejectment, as evidence against a marriage, and, in like manner in personal actions, immediately founded on a supposed marriage. So a direct sentence in a suit upon a promise of marriage, against the contract, has been admitted as evidence against such contract, in an action brought upon the same promise for damages, it being

a direct sentence of a competent court, disproving the ground of the action. So a sentence of nullity is equally evidence in a personal action against a defence founded upon a supposed coverture. [*428] But in all these cases, the parties to the suits, or at least the parties against whom the evidence was received, were parties to the sentence, and had acquiesced under it; or claimed under those who were parties and had acquiesced.

But although the law stands thus with regard to civil suits, proceedings in matters of crime, and especially of felony, fall under a different consideration: first, because the parties are not the same; for the king, in whom the trust of prosecuting public offenses, is vested, and which is executed by his immediate orders, or in his name by some prosecutor, is no party to such proceedings in the ecclesiastical court, and cannot be admitted to defend, examine witnesses, in any manner intervene, or appeal: secondly, such doctrines would tend to give the spiritual courts, which are not permitted to exercise any judicial cognizance in matters of crime, an immediate influence in trials for offences, and to draw the decision from the course of the common law, to which it solely and peculiarly belongs.

The ground of the judicial powers given to ecclesiastical courts is, merely, of a spiritual consideration, "*pro correctione morum, et pro salute animae*." They are therefore addressed to the conscience of the party. But one great object of temporal jurisdiction is the public peace: and crimes against the public peace are wholly, and in all their parts, of temporal cognizance alone. A felony by common law was also so. A felony by statute becomes so at the moment of its institution. The temporal courts alone can expound the law, and judge of the crime, and its proofs; in doing so, they must see with their own eyes, and try by their own rules, that is, by the common law of the land; it is the trust and sworn duty of their office.

When the acts of Henry VIII. first declared what marriages should be lawful, and what incestuous, the temporal courts, though they had before no jurisdiction, and the acts did not by express words give them any upon the point, decided, incidentally, upon the construction, declared what marriage came within the Levitical

decree, and prohibited the spiritual courts from giving or proceeding upon any other construction.

Whilst an ancient statute subsisted (2 H. 4, c. 15), by which personal punishment was incurred on holding [*429] heretical doctrines, the temporal courts took notice, incidentally, whether the tenet was heretical or not; for "the king's court will examine all things ordained by statute."

When the statute of Wm. III. made certain blasphemous doctrines a temporal crime, the temporal courts alone could determine, whether the doctrine complained of was blasphemous so as to constitute the crime.

If a man should be indicted for taking a woman by force and marrying her, or for marrying a child without her father's consent; or for a rape where the defence is, that "the woman is his wife;" in all these cases, the temporal courts are bound to try the prisoner by the rules and course of the common law, and incidentally to determine what is heretical, and what is blasphemous; and whether it was a marriage within the statute—a marriage without consent; and whether, in the last case, the woman was his wife: but if they should happen to find that sentences, in the respective cases, had been given in the spiritual court upon the heresy, the blasphemous doctrines, the marriage by force, the marriage without consent, and the marriage on the rape, and the court must receive such sentences as conclusive evidence, in the first instance, without looking into the case: it would vest the substantial and effective decision, though not the cognizance of the crimes, in the spiritual court, and leave to the jury, and the temporal courts, nothing but a nominal form of proceeding, upon what would amount to a predetermined conviction or acquittal; which must have the effect of a real prohibition, since it would be in vain to prefer an indictment, where an act of a foreign court shall at once seal up the lips of the witnesses, the jury, and the court, and put an entire stop to the proceeding.

And yet it is true, that the spiritual courts have no jurisdiction, directly or indirectly, in any matter not altogether spiritual; and it is equally true, that the temporal courts have the sole and entire cognizance of crimes, which are wholly and altogether temporal in their nature.

And if the rule of evidence must be, as it is often declared to be, reciprocal; and that in all cases in which sentences favorable to the prisoner, are to be admitted as conclusive evidence for him; the sentences, if unfavourable to the prisoner, are in like manner conclusive evidence [*430] against him; in what situation must the prisoners be, whose life, or liberty, or property, or fame rests on the judgments of courts, which have no jurisdiction over them in the predicament in which they stand? and in what situation are the judges of the common law, who must condemn, on the word of an ecclesiastical judge, without exercising any judgment of their own?

The spiritual court alone can deprive a clergyman. Felony is a good cause of deprivation: yet in Lord Hobart's reports it is held, that they cannot proceed to deprive for felony, before the felon has been tried at law; and although, after conviction, they may act upon that, and make the conviction a ground of deprivation, neither side can prove or disprove anything against the verdict; because, as that very learned judge declares, "it would be to determine, though not capitally, upon a capital crime, and thereby judge of the nature of the crime, and the validity of the proofs; neither of which belongs to them to do."

If, therefore, such a sentence, even upon a matter within their jurisdiction, and before a felony committed, should be conclusive evidence on a trial for felony committed after, the opinion of a judge, incompetent to the purpose, resulting (for aught appears) from incompetent proofs (as suppose the suppletory oath), will direct or rule a jury and a court of competent jurisdiction, without confronting any witnesses, or hearing any proofs: for the question supposes, and the truth is, that the temporal court does not and cannot examine, whether the sentence is a just conclusion from the case, either in law or fact; and the difficulty will not be removed by presuming that every court determines rightly, because it must be presumed too, that the parties did right in bringing the full and true case before the court; and if they did, still the court will have determined rightly by ecclesiastical laws and rules, and not by those laws and rules by which criminals are to stand or fall in this country.

If the reason for receiving such sentence is, because it is the

judgment of a court competent to the inquiry then before them; from the same reason, the determination of two justices of the peace upon the fact or validity of a marriage, in adjudging a place of settlement, may hereafter be offered as evidence, and give the law to the highest court of criminal jurisdiction. [*431]

But if a direct sentence upon the identical question, in a matrimonial cause, should be admitted as evidence (though such sentence against the marriage has not the force of a final decision, that there was none), yet a cause of jactitation is of a different nature; it is ranked as a cause of defamation only, and not as a matrimonial cause, unless where the defendant pleads a marriage; and whether it continues a matrimonial cause throughout, as some say, or ceases to be so on failure of proving a marriage, as others have said, still the sentence has only a negative and qualified effect, viz., "that the party has failed in his proof, and that the libellant is free from all matrimonial contact, as far as yet appears;" leaving it open to new proofs of the same marriage in the same cause, or to any proofs of that or any other marriage in another cause; and if such sentence is no plea to a new suit there, and does not conclude the court which pronounces, it cannot conclude a court which receives the sentence from going into new proofs to make out that or any other marriage.

So that, admitting the sentence in its full extent and import, it only proves, that it did not yet appear that they were married, and not that they were not married at all; and, by the rule laid down by Holt, L. C. J., such sentence can be no proof of anything to be inferred by argument from it; and therefore it is not to be inferred, that there was no marriage at any time or place, because the court had not then sufficient evidence to prove a marriage at a particular time and place. That sentence, and this judgment may stand well together, and both propositions be equally true: it may be true, that the spiritual court had not then sufficient proof of the marriage specified, and that your lordships may now, unfortunately, find sufficient proof of some marriage.

But if it was a direct and decisive sentence upon the point, and, as it stands, to be admitted as conclusive evidence upon the court, and not to be impeached from within; yet, like all other acts of the

highest judicial authority, it is impeachable from without: although it is not permitted to show that the court was mistaken, it may be shown that they were misled.

Fraud is an extrinsic, collateral act; which vitiates the most solemn proceeding of courts of justice. Lord Coke says, it avoids all judicial acts, ecclesiastical or temporal. [*432]

In civil suits all strangers may falsify, for covin, either fines, or real or feigned recoveries; and even a recovery by a just title, if collusion was practised to prevent a fair defence; and this, whether the covin is apparent upon the record, as not essoining, or not demanding the view, or by suffering judgment by confession or default: or extrinsic, as not pleading a release, collateral warranty, or other advantageous pleas.

In criminal proceedings, if an offender is convicted of felony on confession, or is outlawed, not only the time of the felony, but the felony itself, may be traversed by a purchaser, whose conveyance would be affected as it stands; and, even after a conviction by verdict, he may traverse the time.

In the proceedings of the ecclesiastical court the same rule holds. In *Dyer* there is an instance of a second administration, fraudulently obtained, to defeat an execution of law against the first; and the fact being admitted by demurrer, the court pronounced against the fraudulent administration. In another instance, an administration had been fraudulently revoked; and the fact being denied, issue was joined upon it; and the collusion being found by a jury, the court gave judgment against it.

In the more modern cases, the question seems to have been, whether the parties should be permitted to prove collusion; and not seeming to doubt but that strangers might. So that collusion, being a matter extrinsic of the cause, may be imputed by a stranger, and tried by a jury, and determined by the courts of temporal jurisdiction.

And if a fraud will vitiate the judicial acts of the temporal courts, there seems as much reason to prevent the mischiefs arising from collusion in the ecclesiastical courts, which, from the nature of their proceedings, are at least as much exposed, and which we

find have been, in fact, as much exposed, to be practised upon for sinister purposes, as the courts in Westminster hall.

We are therefore unanimously of opinion :

First, that a sentence in the spiritual court against a marriage in a suit of jactitation of marriage is not conclusive evidence, so as to stop the counsel for the crown from proving the marriage in an indictment for polygamy.

But secondly, admitting such sentence to be conclusive [*433] upon such indictment, the counsel for the crown may be admitted to avoid the effect of such sentence, by proving the same to have been obtained by fraud or collusion.

HIBSHMAN v. DULLEBAN.

4 Watts (Pennsylvania) 182. (1835)

Res Judicata—Incidentally in Question—Complete Jurisdiction.

Action on the case. Judgment for Plaintiff. Affirmed.

The Court by Gibson, C. J. The defendants having pleaded a release to the plaintiff's declaration for a legacy and the plaintiff having replied *per fraudem*, the defendants rejoin that the release was exhibited by them in the orphan's court, and allowed by that court as a decisive bar to exceptions taken by the plaintiff to their administration account; and the question raised by the demurrer is, whether the validity of the release has passed *in rem judicatam*. The law of the [*191] case, with its distinctions, has been compressed into the dimensions of a nutshell, by Chief Justice De Grey, in the *Duchess of Kingston's Case*, 11 St. Tr. 261; and though the passage is a trite one, yet as it could not otherwise be so well expressed, it is proper to repeat it in his own words. "From the variety of cases in respect to judgments being given in evidence," said the chief justice, "these two distinctions seem to follow as being generally true: first, that the judgment of a court of *concurrent* jurisdiction *directly* upon the point, is, as a plea, a bar—or as evidence, conclusive, between the same parties on the same matter *directly* in question in another court; secondly, that the judgment of a court of *exclusive* jurisdiction directly upon the point, is in like manner conclusive upon the same matter between the same parties coming *incidentally* in question in another court for a differ-

ent purpose. But neither the judgment of a concurrent or exclusive jurisdiction, is evidence of any matter INCIDENTALLY cognizable, nor of any matter to be inferred by argument from the judgment." This brief but comprehensive summary furnishes a rule for every case that any complication of circumstances can produce. Now, did the question of fraud come before the orphan's court directly or incidentally? Not directly certainly, for that court had jurisdiction of it only incidentally, and not to entertain an action whose immediate object should be to ascertain the fact. In *Blackham's Case*, 1 Salk. 290, the defendant proved that the goods, for the conversion of which the action was brought, had belonged to Mrs. Blackham, whose administrator he then was; to rebut which, the plaintiff proved that he was her husband; whereupon the defendant contended that the marriage was conclusively negated by the grant of administration to himself, in preference to the plaintiff, her pretended husband. But Lord Holt said, that though a matter directly determined by the sentence could not be gainsaid, yet that the principle has regard but to a point directly tried, and not to a matter collaterally inferable from it. The same principle was recognized by the king's bench, in *Clues v. Bathurst*, Ca. Temp. Hard. 12. The case of *Rex v. Vincent*, Stra. 481, in which it was held, that the production of a probate by a prisoner indicted for forging a will, is conclusive for him, has been repeatedly overruled. And the judgment must not only have been direct, but conclusive of the matter adjudged, in the court where it was rendered; for, as is justly remarked by Mr. Starkie, part two, section sixty-five, if it did not decide the point there, it ought not to decide it elsewhere. On all these grounds the decree of the orphan's court was incompetent to affect the plaintiff in his common law action. The validity of the release was drawn into contest incidentally; and the point being thus incidentally decided against him, can no more prejudice his title in another court, than can the decision of a surrogate or register prejudice the title of an unsuccessful claimant of administration to the estate of a decedent. Again, the point was not actually, or at least necessarily, decided. The plaintiff's exceptions to the [*192] administration account, were also the exceptions of Henry Dulleban's trustees;

and whether the release were good or bad, was a question whose decision could not supplant a decision of them on the merits. It did not supplant it; and the gratuitous determination of a point involving the question of fraud, which had no effect there, ought to have no effect here, especially to deprive the plaintiff of a trial by jury.

Judgment affirmed.

RUFF v. RUFF.

85 Pennsylvania State (6 Norris) 333. (1877)

Res Judicata—Garnishment Judgments—Who Bound.

Debt on a judgment note sued by C. P. Ruff for use of Wm. Hillis against Michael Ruff in Westmoreland common pleas. The note was executed by Michael to C. P., August 1, 1868, and assigned by C. P. to Hillis, Feb. 20, 1874. Defendant pleads that before this action was commenced and before the assignment of the note to Hillis, this defendant was summoned as garnishee in an action by Thos. J. Barclay against Michael Ruff, and upon issue formed and tried between said Barclay as plaintiff and this defendant as garnishee, he was found not liable on said note, and judgment entered in his favor; which judgment is a bar to this action. To this special plea defendant demurred. The demurrer was held bad, and judgment given for the defendant. Plaintiff brings error. Reversed.

A. S. Stewart, H. D. Foster, and McAfee & Atkinson, for plaintiff in error.

Cowan & Hazlett and H. C. & J. A. Marchand, for defendant.

The Court by Gordon, J. * * * The one question for us to resolve is, was C. P. Ruff, by reason of his having been served with the writ of attachment, such a party or privy to this issue as would make the judgment therein binding on him? If he is so bound, the demurrer to the defendant's plea in bar was well ruled by the court below; if not, that ruling was erroneous. But if he was such a party, then should he have been included in the issue and the jury should also have been sworn as to him; this, however, was not done; and why not? The answer is, because he had no standing as a party against the garnishee, and was, there-

fore, properly excluded from a participation in the trial. If he had ought to say against the judgment, from which the attachment issued, he might have pleaded and had issue; it is, that he might have such opportunity, that the act of assembly directs that notice be given the debtor, if he is in the county. With such trial, however, the garnishee has no concern, neither is it a prerequisite to a trial against him: *McCormack v. Hancock*, 2 Pa. St. (2 Barr) [*336] 310. It is thus apparent that the two issues are quite distinct, and that whilst in the latter, the garnishee has no interest, in the former the debtor has none, and so may not intervene either to direct or control it. So completely does his interest antagonize that of both the contending parties that, even before the Act of 1869, he might have been a witness for either: *Cemmill v. Butler*, 4 Pa. St. (4 Barr) 232. Again, it is not correct to assume that the attaching creditor stands, in all respects, in the place of the debtor as to the goods and credits attached; for, if such were the case, then would a judgment, for or against the garnishee, be conclusive, not only as to the debtor, but also as to his creditors. Such, however, is not the case as to creditors or trustees in insolvency: *Breading v. Siegworth*, 29 Pa. St. (5 Casey) 396; *Tams v. Bullitt*, 35 Pa. St. (11 Casey) 308.

What shall we say, then; that the debtor is concluded by the result of an issue in which he has no interest; from which by legal rule he is excluded; in which he cannot be heard, except as a witness, and which does not conclude his creditors? This proposition contains in itself its own answer. If one is to be concluded by a judgment he must have his day in court; some say in, and control over, the trial. But C. P. Ruff had neither control over nor say in the issue between Barclay and the garnishee. Barclay might have permitted the case to go by default; he might have have discontinued, or he and the garnishee might have compromised, and C. P. Ruff could not have intervened to prevent either. He was literally barred out of the case, and for the sufficient reason that he was no party to it; hence, by all rule, he is not concluded by the judgment resulting from its trial.

The judgment of the court below is reversed.

KITSON v. FARWELL.

132 Illinois 327, 23 N. E. 1024. (1890)

Res Judicata—Inferred by Argument.

Motion by Samuel Kitson in the county court of Cook Co. to be discharged from imprisonment on execution on a judgment in favor of J. V. Farwell et al. The motion was opposed on the ground that malice was the gist of the cause for which the judgment was rendered. From an order denying the motion Kitson appealed to the circuit court of Cook Co. A jury being there impaneled to try the question, the petitioner offered evidence to prove that the judgment under which he was imprisoned was for a debt contracted *bona fide*. Thereupon the respondents offered in evidence the declaration and files in the original action, and the court refused to hear the petitioner's evidence, on the ground that the declaration and files in the original action showed that the question now made was then tried and found against the petitioner. The circuit court then entered an order affirming the judgment of the county court. On appeal to the appellate court this judgment was affirmed, and the petitioner again appeals. Reversed.

Bisbee, Ahrens, & Decker for appellant.

Tenney, Hawley, & Coffeen for appellees.

The Court by Shope, C. J. * * * [*336] The declaration offered in evidence contained three counts, to which the plea of the general issue was filed, and on the trial of the issue thus made a general verdict was rendered finding the defendant guilty and assessing the plaintiffs' damages.

If it be conceded, which may be done for the purposes of this case, that the first count of the declaration states a good cause of action, as for deceit, it can not be said, under the rulings of this court, that the second and third counts present a good cause of action. * * * [*339]

The former judgment, when introduced in evidence, was conclusive as to every matter directly and properly at issue in that suit; and if the question of whether the petitioner, by false and fraudulent representations, or by fraud practiced and perpetrated upon the plaintiffs in that suit, obtained the goods, etc., was neces-

sarily in issue, the doctrine of *res judicata* might be held to apply. The cases are substantially agreed as to the rule, but the difficulty arises in its application, in determining what is to be understood by the "matters in issue" upon the former trial, and what is meant by a judgment directly upon the same matter. * * * It may be stated, generally, that by "matter in issue" is to be understood that matter upon which the plaintiff proceeds by his action, and which the defendant [*340] denies or controverts by his pleadings. And if the declaration, on its face, shows the special matter set up and relied upon by the plaintiffs, and the same is denied by the defendant's plea, it will show the "matter in issue." The judgment necessarily follows the nature of the right claimed in the declaration, or the injury complained of, and, generally speaking, can conclude nothing beyond such right or injury. As we have seen, the judgment is not evidence of any matter which is only to be inferred therefrom by argument, and which probably did, but might or might not, constitute the true ground of recovery. If the rule were otherwise, it would operate harshly and unjustly; for to admit a presumption that a fact is established by the judgment, and not allow that assumption to be rebutted by proof that it is without foundation, would be to reverse the rule applicable to all presumptions of fact. The authorities are, therefore, that a judgment is conclusive only of what it necessarily and directly decides.

It is manifest, that it by no means follows that by the judgment in this case the defendant therein was found guilty of having made any false representations, or of having practiced any deceit, or resorted to any artifice, to obtain possession of the goods in the declaration mentioned, for which an action on the case, as for deceit, would lie. Nor does it militate against this conclusion that the judgment, if rendered under the second and third counts, would be upon an immaterial issue. For some purposes the judgment would be referable to the good count in the declaration, as, upon motion in arrest, or upon error; but where the doctrine of *res judicata* is sought to be applied, it must conclusively appear that the matter was so in issue that it was necessarily determined by the court rendering the judgment interposed as a bar. It may also

be that the matters set up in the second and third counts of the declaration, by means of which it is alleged the petitioner obtained the credit, were in a sense immoral; but as we have already seen, they formed no proper basis for a recovery in the action [*341] in which the judgment was obtained. It may also be true, that if the first count had not been in the declaration, the judgment might, on motion, have been arrested; that it may have been the duty of the defendant to have demurred, as suggested by counsel, and of the court to have sustained the same, to said second and third counts; but that consideration can not affect the question being considered. It is apparent that the jury may just as well have found for the plaintiffs in that action, upon evidence tending to support the second and third counts, only, which would form no basis for or right of recovery for fraud or injury committed by the petitioner in that action, as upon the first count. The finding of the jury, we may argue, was predicated upon the allegation of the first count of the declaration; but it is manifest, under the rule, that will not suffice. If predicated upon the second and third counts of the declaration, alone, it was by no means such as would have authorized a recovery in the suit where malice is the gist of the action.

But it is said that no motion in arrest was entered by the defendant because of the defect in the declaration. Manifestly, such motion would have been unavailing had it been entered while the first count remained.

It follows, that we are of opinion that this judgment, under the pleadings, was not necessarily conclusive of the question as to whether malice was the gist of the action. Independently of the question of whether the record of the superior court of Cook county was receivable in evidence in the circuit court without proof of its identity and genuineness, we are of opinion that the court erred in excluding the offered evidence, and directing a verdict against the petitioner.

The judgments of the appellate and circuit courts will be reversed, and the cause remanded to the circuit court for further proceedings not inconsistent with this opinion.

Judgment reversed.

CROMWELL v. COUNTY OF SAC.

94 United States (4 Otto) 351. (1876)

Collateral Attack—Res Judicata—Parol Proof—Persons Bound—Actual Defense—Negotiable Public Bonds—Bona fide Holder.

Action in the United States circuit court for the state of Iowa. Judgment for defendant. Plaintiff brings error. Reversed.

John N. Rogers for plaintiff.

Galusha Parsons for defendant.

The Court by Field, J. This was an action on four bonds of the county of Sac, in [*352] the state of Iowa, each for \$1,000, and four coupons for interest, attached to them, each for \$100. The bonds were issued in 1860, and were made payable to bearer, in the city of New York, in the years 1868, 1869, 1870, and 1871, respectively, with annual interest at the rate of ten per cent a year.

To defeat this action, the defendant relied upon the estoppel of a judgment rendered in favor of the county in a prior action brought by one Samuel C. Smith upon certain earlier maturing coupons on the same bonds, accompanied with proof that the plaintiff Cromwell was at the time the owner of the coupons in that action, and that the action was prosecuted for his sole use and benefit.

The questions presented for our determination relate to the operation of this judgment as an estoppel against the prosecution of the present action, and the admissibility of the evidence to connect the present plaintiff with the former action as a real party in interest.

In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity

with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defences actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defences were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law [*353] are concerned, as though the defences never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defence actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.

But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action.

The difference in the operation of a judgment in the two classes of cases mentioned is seen through all the leading adjudications upon the doctrine of estoppel. Thus, in the case of *Outram v. Morewood*, 3 East, 346, the defendants were held estopped from averring title to a mine, in an action of trespass for digging out coal from it, because, in a previous action for similar trespass, they

had set up the same title, and it had been determined against them. In commenting upon a decision cited in that case, Lord Ellenborough, in his elaborate opinion, said: "It is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel. The recovery of itself in an action of trespass is only a bar to the future recovery of damages for the same injury; but the estoppel precludes parties and privies from contending to the contrary of that point or matter of fact, which, having been once distinctly put in issue by them, or by those to whom they are privy in estate or law, has been, on such issue joined, solemnly found against them." And in the [*354] case of *Gardner v. Buckbee*, 3 Cowen (N. Y.), 120, it was held by the supreme court of New York that a verdict and judgment in the marine court of the city of New York, upon one of two notes given upon a sale of a vessel, that the sale was fraudulent, the vessel being at the time unseaworthy, were conclusive upon the question of the character of the sale in an action upon the other note between the same parties in the court of common pleas. The rule laid down in the celebrated opinion in the case of the *Duchess of Kingston* was cited, and followed: "The judgment of a court of concurrent jurisdiction directly upon the point is as a plea a bar, or as evidence conclusive between the same parties upon the same matter directly in question in another court."

These cases, usually cited in support of the doctrine that the determination of a question directly involved in one action is conclusive as to that question in a second suit between the same parties upon a different cause of action, negative the proposition that the estoppel can extend beyond the point actually litigated and determined. The argument in these cases, that a particular point was necessarily involved in the finding in the original action, proceeded upon the theory that, if not thus involved, the judgment would be inoperative as an estoppel. In the case of *Miles v. Caldwell*, 69 U. S. (2 Wallace) 35, a judgment in ejectment in Missouri, where actions of that kind stand, with respect to the operation of a recovery therein, as a bar or estoppel, in the same position as other actions, was held by this court conclusive, in a subsequent suit in equity between the parties respecting the title, upon the question

of the satisfaction of the mortgage under which the plaintiff claimed title to the premises in the ejectment, and the question as to the fraudulent character of the mortgage under which the defendant claimed, because these questions had been submitted to the jury in that action, and had been passed upon by them. The court held, after full consideration, that in cases of tort, equally as in those arising upon contract, where the form of the issue was so vague as not to show the questions of fact submitted to the jury, it was competent to prove by parol testimony what question or questions of fact were thus submitted and necessarily passed upon by them; and [*355] by inevitable implication also held that, in the absence of proof in such cases, the verdict and judgment were inconclusive, except as to the particular trespass alleged, whatever possible questions might have been raised and determined.

But it is not necessary to take this doctrine as a matter of inference from these cases. The precise point has been adjudged in numerous instances. It was so adjudged by this court in *Washington A. & G. Co. v. Sickles*, 65 U. S. (24 How.) 33. In that case, an action was brought upon a special parol contract for the engines, by which the plaintiffs, who had a patent for the cut-off, were to attach one of their machines to the engine of the defendants' boat, and were to receive for its use three-fourths of the saving of fuel thus produced, the payments to be made from time to time when demanded. To ascertain the saving of fuel an experiment was to be made in a specified manner, and the result taken as the rate of saving during the continuance of the contract. The plaintiffs in their declaration averred that the experiment had been made, at the rate of saving ascertained, and that the cut-off had been used on the boat until the commencement of the suit. In a prior action against the same defendant for an instalment due, where the declaration set forth the same contract in two counts, the first of which was similar to the counts in the second action, and also the common counts, the plaintiffs had obtained verdict and judgment; and it was insisted that the defendant was estopped by the verdict and judgment produced from proving that there was no such contract as that

declared upon or that no saving of fuel had been obtained, or that the experiment was not made pursuant to the contract, or that the verdict was rendered upon all the issues, and not upon the first count specially. The circuit court assented to these views, and excluded the testimony offered by the defendants to prove those facts. But this court reversed the decision, and held that the defendants were not thus estopped.

"The record produced by the plaintiffs," said the court, "showed that the first suit was brought apparently upon the same contract as the second, and that the existence and validity [*356] of that contract might have been litigated. But the verdict might have been rendered upon the entire declaration, and without special reference to the first count. It was competent to the defendants to show the state of facts that existed at the trial, with a view to ascertain what was the matter decided upon by the verdict of the jury. It may have been that there was no contest in reference to the fairness of the experiment, or to its sufficiency to ascertain the premium to be paid for the use of the machine at the first trial, or it may have been that the plaintiffs abandoned their special counts and recovered their verdict upon the general counts. The judgment rendered in that suit, while it remains in force, and for the purpose of maintaining its validity, is conclusive of all the facts properly pleaded by the plaintiffs; but when it is presented as testimony in another suit, the inquiry is competent whether the same issue has been tried and settled by it."

It is not believed that there are any cases going to the extent that because in the prior action a different question from that actually determined might have arisen and been litigated, therefore such possible question is to be considered as excluded from consideration in a second action between the same parties on a different demand, although loose remarks looking in that direction may be found in some opinions. On principle, a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause, because it might have been determined in the first action.

Various considerations, other than the actual merits, may govern a party in bringing forward grounds of recovery or defence

in one action, which may not exist in another action upon a different demand, such as the smallness of the amount or the value of the property in controversy, the difficulty of obtaining the necessary evidence, the expense of the litigation, and his own situation at the time. A party acting upon considerations like these ought not to be precluded from contesting in a subsequent action other demands arising out of the same transaction. A judgment by default only admits for the purpose of the action the legality of the demand or claim in suit: it does not make the allegations of the declaration or complaint evidence in an action upon a different claim. The declaration [*357] may contain different statements of the cause of action in different counts. It could hardly be pretended that a judgment by default in such a case would make the several statements evidence in any other proceeding. *Boileau v. Rutlin*, 2 Exch. 665, 681; *Hughes v. Alexander*, 5 Duer, N. Y. Sup'r, 488, 493.

The case of *Howlett v. Tarte*, 10 C. B. N. S. 813, 100 E. C. L. 813, supports this view. That was an action for rent, under a building agreement. The defendant pleaded a subsequent agreement, changing the tenancy into one from year to year, and its determination by notice to quit before the time for which the rent sued for was alleged to have accrued. The plaintiff replied that he had recovered a judgment in a former action against the defendant for rent under the same agreement, which had accrued after the alleged determination of the tenancy, in which action the defendant did not set up the defence pleaded in the second action. On demurrer, the replication, after full argument, was held bad. In deciding the case, Mr. Justice Willes said: "It is quite right that a defendant should be estopped from setting up in the same action a defence which he might have pleaded, but has chosen to let the proper time go by. But nobody ever heard of a defendant being precluded from setting up a defence in a second action because he did not avail himself of the opportunity of setting it up in the first action. * * * I think we should do wrong to favor the introduction of this new device into the law." Mr. Justice Byles said: "It is plain that there is no authority for saying that the defendant is precluded from setting up this defence." Mr. Justice Keating

said: "This is an attempt on the part of the plaintiff to extend the doctrine of estoppel far beyond what any of the authorities warrant."

The language of the vice-chancellor, in the case of *Henderson v. Henderson*, 3 Hare, 100, 115, is sometimes cited as expressing a different opinion; but, upon examining the facts of that case, it will appear that the language used in no respect conflicts with the doctrine we have stated. In that case, a bill had been filed in the supreme court of Newfoundland, by the next of kin of an intestate, against A. and others, for an account of an estate and of certain partnership transactions. A decree was rendered against A., upon which the next of kin brought actions in England. A. then filed a bill there against the next [*358] of kin and personal representative of the intestate, stating that the intestate's estate was indebted to him, and alleging various errors and irregularities in the proceedings in the supreme court of the island, and praying that the estate of the intestate might be administered, the partnership accounts taken, and the amount of the debt due to him ascertained and paid. A demurrer to the bill was allowed for want of equity, on the ground that the whole of the matters were in question between the parties, and might properly have been the subject of adjudication in the suit before that court. It was with reference to the necessity of having the subject of particular litigation, as a whole, at once before the court, and not by piecemeal, that the vice-chancellor said:

"In trying this question, I believe I state the rule of court correctly, that when a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction, the court requires the parties to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in controversy, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to the points upon which the court was required by the parties to form an opinion, and pronounce a judgment, but to every

point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

There is nothing in this language, applied to the facts of the case, which gives support to the doctrine that, whenever in one action a party might have brought forward a particular ground of recovery or defence, and neglected to do so, he is, in a subsequent suit between the same parties upon a different cause of action, precluded from availing himself of such ground.

If, now, we consider the main question presented for our determination by the light of the views thus expressed and the authorities cited, its solution will not be difficult. It appears from the findings in the original action of Smith, that the county of Sac, by a vote of its people, authorized the issue of [*359] bonds to the amount of \$10,000, for the erection of a court-house; that bonds to that amount were issued by the county judge, and delivered to one Meserey, with whom he had made a contract for the erection of the court-house; that immediately upon receipt of the bonds the contractor gave one of them as a gratuity to the county judge; and that the court-house was never constructed by the contractor, or by any other person pursuant to the contract. It also appears that the plaintiff had become, before their maturity, the holder of twenty-five coupons, which had been attached to the bonds; but there was no finding that he had ever given any value for them. The court below held, upon these findings, that the bonds were void as against the county, and gave judgment accordingly. The case coming here on writ of error, this court held that the facts disclosed by the findings were sufficient evidence of fraud and illegality in the inception of the bonds to call upon the holder to show that he had given value for the coupons; and, not having done so, the judgment was affirmed. Reading the record of the lower court by the opinion and judgment of this court, it must be considered that the matters adjudged in that case were these: that the bonds were void as against the county in the hands of parties who did not acquire them before maturity and give value for them, and that the plaintiff, not having proved that he gave such value, was not entitled to recover upon the coupons. Whatever illegality or fraud

there was in the issue and delivery to the contractor of the bonds affected equally the coupons for interest attached to them. The finding and judgment upon the invalidity of the bonds, as against the county, must be held to estop the plaintiff here from averring to the contrary. But as the bonds were negotiable instruments, and their issue was authorized by vote of the county, and they recite on their face a compliance with the law providing for their issue, they would be held as valid obligations against the county in the hands of a *bona fide* holder taking them for value before maturity, according to repeated decisions of this court upon the character of such obligations. If, therefore, the plaintiff received the bond and coupons in suit before maturity for value, as he offered to prove, he should have been permitted to show that fact. There was [*360] nothing adjudged in the former action in the finding that the plaintiff had not made such proof in that case which can preclude the present plaintiff from making such proof here. The fact that a party may not have shown that he gave value for one bond or coupon is not even presumptive, much less conclusive, evidence that he may not have given value for another and different bond or coupon. The exclusion of the evidence offered by the plaintiff was erroneous, and for the ruling of the court in that respect the judgment must be reversed and a new trial had.

Upon the second question presented, we think the court below ruled correctly. Evidence showing that the action of Smith was brought for the sole use and benefit of the present plaintiff was, in our judgment, admissible. The finding that Smith was the holder and owner of the coupons in suit went only to this extent, that he held the legal title to them, which was sufficient for the purpose of the action, and was not inconsistent with an equitable and beneficial interest in another.

Judgment reversed, and cause remanded for a new trial.

Clifford, J., dissenting. * * * [*363] * * * Suit is now brought upon the bonds to which those coupons were attached, and the sole question of any importance is whether the judgment in the former case is a bar to the present suit.

Nothing can be more certain in legal decision than the propo-

sition that the title to the bonds and coupons are the same, as the coupons were annexed to the bonds when the bonds were executed and delivered to the original holder, in pursuance of the contract for building the court-house; and it is equally certain, that if it could be proved in defence that the consideration was illegal, or that the instruments were fraudulent in their inception, or that they had been lost or stolen before they were negotiated to the holder, the defence would apply to the bonds as well as the coupons. * * * [*370] * * * He alleged in the declaration that he paid value, and consequently he might have given evidence to prove it, which shows that the question was directly involved in the issue between the parties.

Doubtless the plaintiff neglected to give evidence in that behalf, for the reason that he and his counsel were of the opinion that the evidence introduced by the defendants was not sufficient to repel the *prima facie* presumption, arising from his possession of the instruments, that he paid value for the transfer, and I am still of that opinion; but the remedy of the plaintiff, if surprised, was to except to the ruling, or to submit a motion for new trial.

Suggestions of that sort are now too late, nor are they sufficient to modify the effect of the judgment. When once finally rendered, the judgment must be considered conclusive, else litigation [*371] will be endless. Litigants sometimes prefer not to bring forward their whole case or defence, in order to enjoy the opportunity to bring up a reserve in case of defeat in the first contest; but a rule which would sanction that practice would be against public policy, as it would enable a party to protract the litigation as long as he could find means or credit to compel the attendance of witnesses and to secure the services of counsel.

VI. THE SATISFACTION OF JUDGMENTS.

A. PROCESSES TO OBTAIN.

a. NATURE OF THE PROCESSES.

SIR WILLIAM HARBERT'S CASE.

3 Reports (Coke) 11b.

Remedial Processes at Common Law—To Sovereign and Citizen—Statute Westm. 2d, c. 11, 18, & 45—Statute de Mercatoribus—Statute 25 Edw. 3 c. 17—Origin and Extent of Imprisonment for Debt—Liability of Land to Execution.

This decision was rendered in the English court of exchequer at Mich. term, 27 & 28 Eliz. (A. D. 1585).

This was a *scire facias* issued out of the court of exchequer in the 18th year of Eliz., on a recognizance acknowledged to the king in the court of augmentation in the fourth year of Edward VI., by Matthew Harbert. Said Harbert having died, the *scire facias* was directed against the executors of his will and the heirs of his land, and the sheriff made return that said Harbert had no executors within his bailiwick and that he had summoned Sir William Harbert, the son and heir of said Matthew, etc. On the return day said Sir William made default, upon which the barons gave judgment in favor of the Queen against him generally for said 300*l*. And thereupon said Sir William brought the case here on writ of error, and assigned three errors: 1 on the *scire facias*; 2 on the return; and, 3 on the judgment.¹ And this term the errors were moved by

¹The Error Alleged of the *scire facias* was that it was against the heir of the land and not against the heir simply. The error alleged of the return was that it was not responsive to the writ in that it specified no land. The error alleged of the judgment was that it should have been special, because defendant's own land, not acquired by descent from his father, would be liable on this general judgment, whereas he was liable only as *terra tenant*. These are the questions which the

Plowden, being of counsel with *Sir William Harbert*, before *Sir Thomas Bromley*, Lord Chancellor of England, and the *Baron of Burleigh*, Lord Treasurer of England, and the two chief justices, *Wray* and *Anderson*, in the exchequer chamber. And in this case divers points were resolved.

First, that at the common law, where a common person sues a recognizance or a judgment for debt or damages, he shall not have the body of the defendant, nor his lands (unless in special case) in execution. But at the common law he shall have execution in such case only of his goods and chattels, and of corn, and the like present profit which shall grow upon the land, to which purpose the common law gave him two several writs: [*12] 1. A *levari facias*, by which writ the sheriff was commanded, *quod de terris & catallis ipsius A. &c. levari facias, &c.* and another writ called *fieri facias*, which was only *de bonis & catallis*, both which writs ought to be sued within the year after the judgment, or the recognizance acknowledged; and if he had not the one or the other within the year, the plaintiff or the conusee was put to his action of debt. And now by the statute of Westminster, 2 cap. 45, a *scire facias* is given; and by the statute of Westminster, 2 cap. 18, *cum debitum fuerit recuperatum, &c.*, the *elegit* is given of the moiety of the land, which was the first act which subjected land to the execution of a judgment, or of a recognizance, which is in the nature of a judgment, and therewith agreeth Fitzherbert's *Natura Brevium* 265, g. And by the statute of 13 Edw. 1. *de mercatoribus*, 27 Edw. 3 cap. 9, and 23 Hen. 8 cap. 6, it is provided, that in case of a statute merchant, or statute staple all the lands which the conusor had at the day of the conusance shall be extended in whose hands soever they after come, either by feoffment or other manner. But in debt against the heir upon an obligation made by his ancestor, the plaintiff by the common law should have all the land which descended to him in execution against him, and yet he should not have execution of any part of

reporter says were not resolved by the court. The case is given here because it is generally cited as a leading case on the matters here reprinted, and because the law is stated with Coke's usual accuracy and discrimination.

the land against the father himself ; but the reason thereof was, because the common law gave an action of debt against the heir ; and in such case, if he should not have execution of the land against the heir, he could have no fruit of his action ; for the goods and chattels of the debtor do belong to his executors or administrators, and so for necessity in such case, only land was liable to execution of the debt of a common person at the common law. Also the body of the defendant was not liable to execution for debt at the common law, *vide* 13 Hen. 4, 1. But the common law, which is the preserver of the common peace of the land, did abhor all force as a capital enemy to it ; and therefore, against those who committed any force, the common law did subject their bodies to imprisonment, which is the highest execution, by which he loses his liberty till he agree with the party, and pay a fine to the king ; and therefore it is a rule in law, that in all actions *quare vi & armis*, *capias ad respondendum* lies, and where *capias* lies in process, there, after judgment, *capias ad satisfaciendum* lies, and there the king shall have *capias pro fine*. With that agreeth 8 Hen. 6, 9 ; 35 Hen. 6, 6 ; 22 Edw. 4, 22 ; 40 Edw. 3, 25 ; 49 Edw. 3, 2, and many other books. Then by the statutes of Marleberge, cap. 23, and Westminster 2, cap. 11, *capias* was given in accompt, for at the common law process in accompt was distress infinite ; and afterwards by the statute of 25 Edw. 3, cap. 17, the like process was given in debt as in accompt, for before that statute the body of the defendant was not liable to execution for debt, for the reason and cause aforesaid ; but it was resolved, that at the common law, the body, the land, and the goods of the accomptant, or the king's debtor, were liable to the king's execution, for *thesaurus regis est pacis vinculum et bellorum nervi*. And therefore the law gave the king full remedy for it ; and therewith agrees 5 Eliz. Dier 224, and Plowden's Comm. 321, Sir William Cavendish's case, who was treasurer of the chamber, 24 Edw. 3 ; Walter de Chirton's case, and infinite precedents in the exchequer, to prove, that for the king's debt, the body and the land of the debtor shall be liable by the common law before the statute of 33 Hen. 8, cap. 39. * * * [*15] * * *

But these [omitted] points were not resolved by the court, but

afterwards, on a petition made to the queen, Sir William compounded with her. Plowden and Coke were of counsel with Sir William Marbert. * * *

Statute of Westminster Second [13 Edward I, A. D. 1285], Chapter 18.—Cum debitum fuerit recuperatum, vel in curia regis recognitum, vel damna adjudicata sit de cætero in electione illius qui sequitur pro hujusmodi debito, aut damnis, sequi breve quod vicecom' fieri faciat de terris et catallis debitoris, quod vicecom' liberet ei omnia catalla debitoris (exceptis bobus et afris carucæ), et medietatem terrae suae quousque debitum fuerit levatum per rationabile precium et extentum. Et si ejiciatur de illo tenemento, habeat recuperare per breve novæ disseisinæ, et postea per breve de redisseisina, si necesse fuerit.

Translation.—When debt is recovered, or acknowledged in the king's court, or damages awarded, it shall be from henceforth in the election of him that sueth for such debt or damages, to have a writ of fieri facias unto the sheriff for to levy the debt of the lands and goods; or that the sheriff shall deliver to him all the chattels of the debtor (saving only his oxen and beasts of his plough) and the one-half of his land, until the debt be levied upon a reasonable price or extent. And if he be put out of that tenement, he shall recover by a writ of novel disseisin, and after by a writ of redisseisin, if need be.

ALLEN v. HALL.

46 Massachusetts (5 Metc.) 263. (1842)

**Grounds for Charging Garnishee—Measure of Liability—Defenses—Comparative Lien on Credits and Property Possessed—Proceedings Necessary to Perfect Attachment
Lien—Effect of Departure.**

F. Hilliard, for the plaintiff.

Griggs, for the defendant.

The Court by Shaw, C. J. In *scire facias* against a trustee. The question is, whether the defendant can set off demands, which he had at the time he was summoned in the suit, against Joseph Tufts, the principal defendant.

The trustee process, provided for by statute, manifestly contemplates two distinct classes of cases, in which a creditor may avail himself of its provisions to secure his debt, by attaching property in the hands of a third person; the one, when the trustee has in his custody, or under his control, goods or chattels, liable by law to be attached on mesne process, by the ordinary writ of attachment; the other, where the trustee is a debtor to the principal de-

fendant, and owes him money, either due and payable presently, or existing as a debt at the time of the attachment, though payable at a future day. *Maine F. & M. Ins. Co. v. Weeks*, 7 Mass. 438; *Swett v. Brown*, 5 Pick. 178.

This distinction is founded on the statute rendering *goods* and [*265] *credits*, respectively, liable to attachment. In the former case, the attachment binds the goods specifically, creates a lien upon them, of the same nature and to the same extent, as an ordinary attachment on mesne process, although the goods are to *stand charged*, in the hands of the trustee, so that the custody remains with the trustee, instead of being taken by the attaching officer, unless a subsequent attachment is made by another creditor, which may be done, subject to the first attachment. *Parker v. Kinsman*, 8 Mass. 486; *Burlingame, v. Bell*, 16 Mass. 318. But in both cases, the goods thus charged are deemed to be in the custody of the law, and they are made applicable to the purpose for which they are attached and held, in the same manner; that is, by being advertised and sold by the officer on execution, and the proceeds applied to its satisfaction. The only difference is, that in the case of the trustee attachment, the goods, having remained in the custody of the trustee, must be by him exposed and delivered over to the officer holding the execution; whereas, in the case of an attachment by the ordinary process, the goods are in the custody of the officer, ready to be sold on the execution, when it comes into his hands for satisfaction.

But under the other clause of the statute, rendering *credits* liable to be attached, the case is wholly different. It affects another species of property, and accomplishes its purposes in an entirely different mode. The great question then, the only question is, whether he *owes* the principal debtor any thing; and if it appears that he does, he is held liable to pay it to his creditor's creditor, instead of paying it to the creditor himself. It is unnecessary here to consider the various questions which may arise, as to the nature of such debts, whether absolute or contingent, and the nature of such contingency; whether, if uncertain at the time, it can be made certain at a future time, by sales, collections of money or other proceedings, showing that in point of fact the trustee was a

debtor to the principal at the time of the attachment. In such cases, although the facts are subsequently disclosed, and the accounts subsequently adjusted, in order to [*266] charge the trustee, the result must show that the trustee was a debtor to the principal, at the time of the attachment.

This distinction between the two classes of cases will go far to show in what cases the trustee may or may not set off such claims as he may have against the principal debtor, and to reconcile what may, without discrimination, be deemed to be conflicting authorities.

On the provision, in which the trustee is charged as a debtor, it is very obvious that he is a mere third party, called in to pay his debt, in a manner different from that in which he was bound to pay it, and in which his own rights are not drawn into controversy, he ought not to be placed in a worse situation than he would be if he were called to make the settlement with his creditor. The balance only, after all just allowances, is the sum for which he ought to be held. He shall therefore have the benefit of a set-off, legal or equitable, in his own right, or in the right of those with whom he is in privy, and in whose favor the debt claimed to be due from the trustee could, in his hands, be made available, by way of set-off in any of the modes provided by law. *Hathaway v. Russell*, 16 Mass. 473; *Picquet v. Swan*, 4 Mason, 443, (Fed. Cas. No. 11133).

But where the trustee has goods in his custody, the property of the principal defendant, and in their nature liable to be attached by the process of law, the question, whether the trustee has any right to set off claims of his own, must depend upon the fact whether he has any lien, legal or equitable, upon such goods, or any right, as against the owner, as whose property they are attached, by contract, by custom, or otherwise, to hold the goods, or to retain the possession of them, in security of some debt or claim of his own. If the party, who is summoned as trustee, has a mere naked possession of the goods, without any special property or lien; if the principal debtor is the owner, and has a present right of possession, so that he might lawfully take them out of the custody, or authorize another to take them out of the custody, of the present holder; they would be liable to be attached as the property

of the general owner, by an officer, under the common process of attachment, if he could have access [*267] to them, and no right of the trustee would be violated. But if the officer cannot have access to the goods, so as to take them into custody; if they are secreted by the trustee, or if the trustee sets up pretended claims and rights of possession, so that the creditor and officer cannot safely take them out of the custody of the trustee, and require the answer and disclosure of the trustee, as to the grounds of his claim to the property or possession; then he may be summoned as trustee; and if it shall subsequently appear, on his disclosures, that he had only such naked possession, without any lien or right of possession, then the goods stand *charged* in his hands, till judgment and execution; and he has no greater right to charge these goods with a debt of his own, by way of set-off, than he would have had, if the goods had been taken into custody by the officer, at the time of the attachment. This, we think, is the result of the laws on this subject. *Allen v. Megguire*, 15 Mass. 490; *Snett v. Brown*, 5 Pick. 178; *Brewer v. Pitkin*, 11 Pick. 298.

We are next to consider how these principles apply to the facts of the present case. It appears that the respondent, Hall, sued out a writ against his debtor, Joseph Tufts, and caused his goods to be attached by an officer. Before judgment, without the consent of the debtor, and without the appraisement and certificate required by law to warrant a sale of goods attached on mesne process, the defendant caused the goods to be sold, and himself became the purchaser of the greater part of them, and, for aught that appears in his answers, had them in his possession at the time of the service of this trustee process. This sale, it is manifest, was wholly void, being not conformable to the Rev. Sts. c. 90, and not authorized by law. *Howe v. Starkweather*, 17 Mass. 240; *Russell v. Dudley*, 3 Met. 147.

The respondent obtained the bare custody of the goods, without lawful possession or right of possession. If the respondent could have the goods in security of his original debt against Tufts, or set off that debt, under this process, he would in effect get possession of his debtor's goods, under color of legal process, without conforming to the requisitions of law, and thus avail himself of

such unauthorized possession, to the same extent [*268] as if he had taken and sold the goods on execution in conformity to law; which he cannot do. The court are of opinion that upon his answers, the respondent was chargeable for the goods of Tufts, when they thus came into his possession, and that not having exposed and delivered them over to be sold, when demanded on the execution, he is now answerable on this *scire facias*, for their value.

Various Names for Garnishment.—In Massachusetts, Maine, New Hampshire and Vermont garnishment is known as trustee process, and the garnishee is called trustee. In Connecticut and Rhode Island, and to some extent in other states, it is called foreign attachment or attachment, and formerly in Connecticut it was called factorizing; but in all these states the stakeholders summoned are called garnishees.

For further preparation as to the nature of attachment and garnishment read again *Cooper v. Reynolds*, ante 15; *Greenvault v. Farmers and Mechanics' Bank*, ante 24; *Wells v. American Express Co.*, ante 31; *Pennoyer v. Neff*, ante 48; and, *Chicago R. I. & P. Ry. Co. v. Sturm*, ante 71.

b. ISSUANCE OF THE PROCESSES.

1. WHAT IS ISSUANCE OF THE PROCESS.

GOWAN v. FOUNTAIN.

50 Minnesota 264, 52 N. W. 862. (1892)

Execution Sale—Collateral Attack—Form of Execution—Recitals—Issuance.

Ejectment by Mary Gowan claiming title by sale on execution against defendants. From judgment for defendants plaintiff brings error. Reversed.

Alva Hunt, for appellant.

C. A. Fosnes, for respondents.

The Court by Mitchell, J. The only questions raised by this appeal involve the validity of the execution sale under which plaintiff claims title to the real estate in controversy.

Judgment was rendered and docketed in the district court in and for Swift county in favor of the plaintiff and against the defendant Bensel.

The clerk of the court in that county "issued" (to use the language of the findings) an execution on the judgment directed to the sheriff of Chippewa county, (in which the land in question is situated,) in which the date of docketing the judgment in the latter county was left blank, and at the same time "issued" a transcript of the judgment, and delivered both to plaintiff's attorney, with directions to him to have the date when the judgment should be docketed in Chippewa county inserted in the execution before it was delivered to the sheriff for service. The attorney transmitted both to the clerk of the court of Chippewa county, with instructions, after the transcript was filed, and the judgment docketed in that county, to insert the date of such docketing in the execution. Pursuant to these instructions, the clerk in Chippewa county filed the transcript, and [*266] docketed the judgment, and inserted the date

thereof in the execution, and returned it to the attorney, by whom it was thereafter delivered for service to the sheriff of Chippewa county, who proceeded thereunder to levy upon and sell the land in question. It will be observed from this that the judgment had been docketed in Chippewa county before the execution was delivered to the sheriff, and that the fact and date of such docketing were then correctly stated therein.

The line of reasoning by which it is sought to establish the proposition that this execution was void is substantially as follows: That at common law all process of courts is limited to the territory over which their jurisdiction extends; that the territorial jurisdiction of the district court in and for a particular county is limited to the county in which it is held; that, therefore, the district court has no authority to issue an execution to another county, except that conferred by statute, which is limited to counties where the judgment is docketed (1878 G. S. ch. 66, § 299); that consequently such docketing is a condition precedent to the authority to issue an execution, which jurisdictional fact must appear on the face of the execution when issued (Id. § 295); that this execution, having been issued before the judgment was docketed in Chippewa county, was absolutely void. This is substantially the line of reasoning advanced by Justice Ryan, speaking for the court, in *Kentzler v. Chicago, M. & St. P. Ry. Co.*, 47 Wis. 641, 3 N. W. Rep. 369. We do not find it necessary to determine in this case whether it is sound or not. We may remark, however, that it seems to us more severely logical than practical, and we are by no means clear that under our judicial system it is correct to say that the territorial jurisdiction of the district court is limited to the county in which it sits, especially in view of the provisions of 1878 G. S. ch. 64, § 3.

But, conceding the soundness of the doctrine, its applicability to the present case depends upon the assumption that this execution was *issued* at the date on which it was made out by the clerk of the court of Swift county, and by him delivered to plaintiff's attorney. If this premise is false, of course the conclusion falls with it. The delivery to the attorney was not unqualified, but only provisional and conditional; the condition being that the judgment should be docketed [*267] in Chippewa county, and the date thereof

inserted in the execution before it was delivered to the sheriff for service. It was issued, in the sense of being taken from the clerk's office, before the judgment was docketed in Chippewa county, but the judgment was docketed in that county before the execution was issued in the sense of being delivered to the sheriff for service; and this is, in legal contemplation, the date of the issue of an execution. This was, in substance, what was held in *Molli-son v. Eaton*, 16 Minn. 426, (Gil. 383). It is true that in that case the levy was on personal property, but, as respects the authority to issue an execution to another county, we cannot see how that makes any difference. The practice adopted in the present case has obtained in this state from a very early date. It is an eminently convenient one and injures nobody. Our conclusion, therefore, is that the execution and the sale under it were valid. * * *

Judgment reversed.

An order was made staying execution for twenty days. During this time the clerk signed, sealed, and delivered an execution to the creditor's attorney. After the stay expired the attorney delivered it to the sheriff who levied it. Mandamus to compel the lower court to vacate the levy was denied, because the writ was not issued till it reached the sheriff's hands. *Peterson v. Wayne Circuit Judge*, 108 Mich. 608, 66 N. W. 487.

The statute declared that judgments of courts of record should be liens on the land of the debtor within the county, but should cease to be such if execution thereon should not be issued within a year. An execution was filled out, signed, sealed, and deposited by the clerk in a pigeon-hole for the sheriff. These facts were held not to be issuing the writ, so as to preserve the lien. *Pease v. Ritchie*, 132 Ill. 638, 24 N. E. 433.

2. ON WHAT DEMANDS THE VARIOUS PROCESSES MAY ISSUE.

FERRIS v. FERRIS.

25 Vermont 100. (1853)

Form of Action—Ex Contractu or Ex Delicto—Garnishment in Trespass—Statutory Conditions and Procedure.

Trespass by Daniel W. Ferris against George W. Ferris in which W. H. Mosher was summoned as trustee. Defendant pleaded in abatement that the writ was issued as an attachment in an action of trespass. Plaintiff demurred. Judgment for defendant, and plaintiff appealed. Affirmed.

H. R. Beardsley for plaintiff.

G. Harrington for defendant.

The Court by Isham, J. The present trustee act, Comp. Stat. 256, provides, that upon all contracts, express or implied, made since the first day of January, 1839, and upon all contracts where the principal defendant [*102] has absconded from, or is resident out of this state, or is concealed within it, a suit may be commenced thereon by a trustee process. This mode of relief is unknown at common law. The remedy itself, the form of the process, and mode of procedure, are given and prescribed by statute, and when adopted, its provisions are to be strictly pursued, and unless the case is expressly provided for by the act, it cannot be sustained. These principles are illustrated and confirmed by the case of *Park et al. v. Trustees of Williams*, 14 Vt. 213.

It is evident, therefore, that this suit cannot be sustained as a trustee process, for the cause of action against the principal defendant does not arise *ex contractu*. It is only in cases of that character, that the process is given by statute * * * [*103] * * * The result is, that the judgment of the county court, dismissing the suit, must be

Affirmed.

STROCK v. LITTLE.

45 Pennsylvania St. 416. (1863)

Same—Garnishment in Account Render.

Foreign attachment in account render by Peter J. Little against Jacob Strock. From judgment in favor of plaintiff defendant brings error. Affirmed.

S. L. Russell, for appellant.

John Cessna, for appellee.

The Court by Woodward, J. The only question upon this record is whether foreign attachment will lie in account render. And why will it not? Under the custom of London, all attachments are grounded upon actions of debt or detinue; but under our statutes, which, being remedial, are to be liberally construed, foreign attachments may issue in all actions sounding in contract where the plaintiff can swear to the amount claimed, or the court, upon a rule to show cause of action, can get at the sum in contro-

versy with [*419] sufficient accuracy to fix the amount of bail which the defendant is to give to dissolve the attachments. This, I take it, is the rule which is deducible from our acts of assembly and from the ruling in *Fisher v. Consequa*, reported in Sergeant on Attachm. 44, s. c., 2 Wash. (U. S. C. C.) 392, Fed. Cas. No. 4816.

It will not lie in actions sounding in *tort*, for it was never designed as a remedy in such cases. *Porter v. Hildebrand*, 14 Pa. St. (2 Harris) 131. Nor in actions *ex contractu* for unliquidated damages, for in such a case the court will have no standard by which to fix the amount of defendant's bail; but wherever, in actions *ex contractu*, the cause of action can be shown with such approximate precision as will enable the court to prescribe the amount of bail to the defendant, the writ may go. * * * A very cumbersome and ill-favored action it is, to be sure, but nevertheless it arises strictly *ex contractu*, is for a debt due, and although it may result as *assumpsit* may, in a balance in favor of the defendant, yet it is a case in which the cause of action may be shown and the bail of defendant may be fixed.

Therefore, we hold it may be commenced by foreign attachment.

The judgment is affirmed.

Reed J., dissented.

ILLINOIS CENTRAL RAILROAD CO. v. WEAVER.

54 Illinois 319. (1870)

Enforcing Garnishment Judgment by Garnishment.

Garnishment by P. A. Ross against the Illinois Central R. R. Co. as debtor of Weaver to enforce a judgment recovered against Weaver as garnishee in an action by said Ross against one Hartman. From a judgment for plaintiff the I. C. R. Co. appeals. Reversed.

Geo. W. Wall, for appellant.

Casey & Dwight, for plaintiff.

The Court by Breese, J. * * * The only question presented is, does a fair construction of the law of garnishment authorize process of garnishment [*321] against the debtor of the garnishee,

against whom an execution has been returned *nulla bona*. R. S. Ch. 8, p. 58. * * *

It is contended by appellee, that, by the thirty-eighth section of chapter 57, title, "Judgments and Executions," R. S. 307, process of garnishment is allowed on all judgments rendered by a justice of the peace, and, therefore, judgment having been rendered against Weaver as the debtor of Hartman, who was the debtor of Ross, the plaintiff in the action, the same process could be awarded against appellant, who was the debtor of Weaver. * * * [*322]

The proceeding is statutory and cannot be extended beyond the plain provisions of the statute, and that evidently confines the proceedings to the debtor of the debtor. An insuperable objection to it, on principle, also exists, and it is this: there is no privity whatever between the judgment debtor, Hartman, and appellants. The principle of garnishment seems to depend on this, and it existed between Hartman, the debtor, and Weaver. To that extent Ross, the plaintiff, could rightfully go, but no further. While Hartman could sue Weaver, he could not have an action against Weaver's debtors, the appellants in this case, he having no interest in the subject, and there being no privity between them. *Harrell v. Whitmore*, 19 Ala. 135. We think a fair construction of the statute can go no further than to allow this process to reach an indebtedness to the judgment debtor, and if the garnishee appears and denies all indebtedness, and none is established against him, the proceeding is at an end. The proceeding can not be extended beyond the mere matter of reaching the property or effects of the defendant. The debt due by appellant to Weaver, was, clearly, not of that character. Even a court of chancery, on a bill filed for such purpose, would have no authority so to apply the debt due to Weaver. *Wolf v. Tappan & Co.* 5 Dana (Ky.), 361; *Jones v. Huntington*, 9 Mo. 247; Drake on Attachments, secs. 454, 459.

In our view of the statute and of the practice under it for many years, we are of opinion that the plaintiff in an action, resorting to garnishment, after having obtained a judgment against his debtor, can not extend it beyond the debtor of his debtor.

The circuit court having entertained different views, the

judgment of that court is reversed, with directions to dismiss the proceeding as against appellants.

Judgment reversed.

In Illinois and a few other states garnishment proceedings are conducted in the name of the judgment debtor against his debtor and judgment entered accordingly, but in most states the proceedings are in the name of the garnishing creditor against the garnishee.

I doubt whether this case would now be followed in many states. The remedy is now treated with greater liberality. The contrary was held in *Sperling v. Calfee*, 7 Mont. 514, 19 Pac. 204. See also *Esler v. Kent Circuit Judge*, post.

Wolf v. Tappan & Co., above, was originally a bill in chancery seeking to obtain from residents of the state what they owed complainant's non-resident debtor. Before the decree had been rendered a supplemental bill was filed, suggesting that the defendants were becoming insolvent, and praying that certain of their debtors, who were made parties to the supplemental bill, be restrained from paying defendants what was due them. The trial court granted the restraining order, but on appeal the decree was reversed, the court saying: "The mere existence of a general pecuniary demand creates no lien, general or specific, either in law or equity, and therefore furnishes no ground, before decree, for the court of equity to act in rem, or in any other manner than upon the person of the debtor. * * * The supplemental bill * * * makes no charge of fraud; and without admitting that the court could have interposed, as it did, on the ground of preventing an intended fraud, the fact that there was no allegation of such a fraud is a sufficient answer."

Jones v. Huntington, was decided on facts similar to those in *Wolf v. Tappan & Co.*, except that the relief was asked in the original bill, against Hamilton as judgment debtor, against Myers as his debtor, and to restrain Huntington from paying to Myers because Myers was a non-resident. The bill was dismissed, the court saying: "The case in the bill would go a bow-shot further than any yet has gone."

ESLER v. KENT CIRCUIT JUDGE.
108 Michigan 543, 66 N. W. 485. (1896)

**Right of Successful Defendant to Process to Enforce his Judgment—
Construction of Statutes Giving to Plaintiff only
Process Unknown to Common Law.**

Mandamus by Alexander D. Esler to compel Allen C. Adsit, circuit judge, to set aside an order vacating a judgment recovered, by Esler. Granted.

Earle & Hyde, for relator.

Hatch & Wilson, for respondent.

The Court by Montgomery, J. This application for man-

damus presents the question of whether a defendant who has recovered a judgment against the plaintiff may sue out a writ of garnishment, based on such judgment, against a third party. The circuit judge held that the defendant is not entitled to the remedy. The statute (3 How. Stat. § 8058) reads as follows: "That in all personal actions arising upon contract, *express or implied*, * * * and in all cases where there remains any sum unpaid upon any judgment or decree * * * if the plaintiff, his agent or attorney, shall file with the clerk, * * * [*544] an affidavit stating * * * etc., a writ of garnishment shall be issued," etc.

The legislative intent, it must be conceded, is not made as clear as might be desired, and we are cited to no case which can be said to rule this. It is safe to assume, in view of the end aimed at by the legislation, that it was not the intent to afford to one party a remedy not open to the other. The ambiguity arises out of the fact that the provision for remedy on judgment was inserted in a section which previously provided for the suing out of the writ at the commencement of suit, and the provision for the making of the affidavit by the plaintiff was left unchanged. Literally construed, this provision would render nugatory the remedy given on a decree; for, strictly speaking, there is no party in chancery designated as "plaintiff." The construction contended for by respondent would also limit the general language giving the remedy in *all cases* where any sum remains unpaid on *any* judgment or decree. We think it not unwarranted to assume that by the word "plaintiff," as here used, was meant the moving party or suitor in the garnishment proceeding. A question having some analogy was presented to the supreme court of Massachusetts. The statute provided that after the rendition of a judgment in a civil action, if the execution had not been satisfied, the court or justice, upon petition of defendant, [*545] might order a stay of *supersedeas*. It was held that the word "defendant," as used, was clearly intended to refer to the person against whom the judgment sought to be recovered was rendered, and who, as petitioner, asked for a stay of execution, and not to the defendant in the original action. *Leavitt v. Lyons*, 118 Mass. 472. See, also, *Westcott v. Booth*, 49

Ala. 182; *Fort Street Union Depot Co. v. Backus*, 103 Mich. 564. It has been held that, in garnishment statutes, the word "plaintiff" should be construed to include the assignee, who is the owner of the judgment. *Dugas v. Mathews*, 9 Ga. 510. We are of opinion that it was intended to give this remedy to the person who recovered judgment or decree, whether he be plaintiff, complainant, or defendant, and that the word "plaintiff," as used in the statute, must be construed to mean the party moving in the garnishment proceeding.

Writ granted.

ELLIOTT v. JACKSON.

3 Wisconsin 649. (1854)

Character of Demand—Ex Contractu or Ex Delicto.

Assumpsit commenced by attachment by Jackson against Elliott. From judgment for plaintiff, defendant brings error. Reversed. Jackson consigned goods to one Kent to sell on commission and Elliott as constable levied on them under an execution against Kent, whereupon Jackson brought this action against Elliott for the value of the goods.

Ingalls, for appellant.

F. S. Lovell, for appellee.

The Court by Smith, J. * * * The whole proceedings as shown by the record, present merely an ordinary case, in which the property of a judgment or attachment debtor was levied upon and claimed by a third person; or, in other words, a fair case for the bringing of an action of trespass, trover, or replevin. But the suit was commenced by attachment, and it doubtless seemed necessary to the learned counsel for the plaintiff below, to bring himself, if possible, within the provisions of the revised statutes, which authorize the commencement of suits by attachment. Section 101 of chapter 28 of the revised statutes provides that, "before any such writ of attachment shall be issued, the plaintiff, or some person in his behalf, shall make and file with the justice an affidavit, stating that the defendant therein is indebted to the plaintiff in a sum exceeding five dollars, and specifying the amount of such indebtedness, as near as may be, over and above all legal

set-offs, and that the same is due upon contract, express or implied, or upon the judgment or decree of some court, and containing a further statement," etc.

The making of this affidavit, and the conformity of the cause of action to the nature of the proceeding contemplated and authorized by this statute, are essential to the jurisdiction of the justice of the writ thereby authorized.

The proceeding by attachment, with all its safeguards, is at best, a violent remedy, and we are not disposed to give to the statute a more liberal construction than a fair interpretation of its letter demands. [*654]

The very essence of the statute is, that to authorize a proceeding by attachment, the cause of action must be *an indebtedness* over and *above all legal set-offs*, and that the same is due upon a contract, express or implied. This case is too clear to admit of a doubt. Neither the affidavit nor the declaration set forth a contract, or a state of facts from which a contract may be legally implied. The affidavit pursues the words of the statute, and therefore the justice was authorized to *issue* the writ. But whenever it appeared, either from the declaration or the evidence, that the true cause of action was not an indebtedness due upon a contract, express or implied, it became his duty to dismiss the case. * * * [*655]

There are some cases in which a party may waive the tort and sue in *assumpsit*. When the trespasser has converted the property into money, the plaintiff may waive the tortious taking and conversion, and sue for the proceeds, as for money had and received. He is considered as ratifying the sale made by defendant, and in such case can recover so much as property brought, and no more. But of late, courts have been rather inclined to restrict, than to extend the class of cases falling within the rule which allows the plaintiff to waive the tort and sue in *assumpsit*. * * *

In the case before us, there is no pretense of a sale of the goods by the defendant below, nor any conversion of them into money, or other thing of value. The action of *assumpsit*, therefore will not lie. This is not a case in which the tort may be waived

and it is apparent, from the character of the affidavit, and the extraordinary character of the declaration, or statement of the cause of action, that the only object in view, in bringing an action of assumpsit, was to render the writ [*656] of attachment available. We cannot permit the statute to be thus defrauded, nor its wholesome restrictions evaded by a subterfuge of such kind. If the action of assumpsit can be sustained in this case, it can in every case in which an officer levies on goods or chattels claimed by another, and indeed, in every case of mere trespass to personal property.

Of course we have here had no reference to cases brought against an executor or administrator, or where the tortfeasor is dead, and the action of trespass or trover is lost, or to the case of tortious enticing away or hiring of apprentices, etc. These and their like rest upon their own peculiar circumstances, and must be determined according to the legal principles applicable to each, as occasion shall require. * * *

The judgment of the county court is reversed, with costs.

WILSON v. LOUIS COOK MANUFACTURING CO.
88 North Carolina 5. (1883)

Character of Demand—Liquidated or Unliquidated—Capable of Measurement—What Standard.

Appeal by plaintiff from an order vacating an order for attachment; the objection being that the action is brought to recover unliquidated damages, too uncertain in amount to enable attachment under Cod. Civ. Proc., 197 providing that the plaintiff may have attachment "in an action arising on contract for the recovery of money only, or in an action for the wrongful conversion of personal property."

Burwell & Walker, for plaintiff.

Jones & Johnston, for defendant.

The Court by Ruffin, J. * * * The law as regards this matter has been recently fully considered in *Price v. Cox*, 83 N. C. 261, and as it is impossible to distinguish the two cases in principle, the conclusion then reached must control us now. The rule to be deduced from that case is, that an attachment may be had in sup-

port of any demand arising *ex contractu*, the amount of which is ascertained or is susceptible of being ascertained by some standard, referable to the contract itself, sufficiently certain to enable the plaintiff to aver it in his affidavit, or a jury to find it; but not so, if the action be one for unliquidated damages, in which the contract alleged furnishes no rule for ascertaining them, but leaves the amount to remain altogether uncertain until fixed by the jury, without any definite rule of law to direct them.

The plaintiff in this action seeks to recover compensation for the loss of such profits, as he conjectures he might have derived from selling buggies as agent for the defendant, had they been furnished him according to the terms of the contract. It is therefore a case of purely uncertain damages, with no standard furnished by the contract itself, or fixed rule of law, for ascertaining them, and it is impossible to suppose a case farther removed from the provisions of the statute than it is.

In *Lawton v. Kiel*, 51 Barb. (N. Y.) 30, cited by counsel, the facts were that the defendant contracted to buy sound corn, but bought indifferent corn for the plaintiff. The standard of damages was said to be the difference in the quality and market values of the two kinds of corn; and as nothing was wanting but for the jury to ascertain that difference, it was held that the plaintiff was entitled to have an attachment under the maxim *id certum est quod certum reddi potest*; and it was so held too, [*7] under somewhat similar circumstances in *Carland v. Cunningham*, 37 Pa. St. 228. But these cases bear no sort of analogy to the one before us, and indeed by referring to the opinions of the judges as delivered in them, they will be found to be in perfect harmony with the decision in *Price v. Cox*. * * *

No error.

Affirmed.

I think this case very accurately and clearly states and illustrates the rule. Substantially the same rule prevails whether attachment be given to "any creditor," or for the recovery of "any debt" or "any demand." *Price v. Cox* above was an action for breach of promise to marry.

Attachment has been held available in an action for damages for

breach of contract to furnish tea of a certain quality, the tea furnished being inferior. The measure of damages is the difference between the market value of the tea furnished and that promised. *Fisher v. Consequa*, 2 Wash. C. C. 382, Fed. Cas. No. 4816. This is the leading case on this point. The same was held in a similar action for delivering flour inferior to contract. *Wilson v. Wilson*, 8 Gill (Md.) 192, 50 Am. Dec. 685. Again it was held available in an action for damages for the non-delivery of goods promised, *Goldsborough, v. Orr* (lumber), 21 U. S. (8 Wheaton), 217; *Hyman v. Newell* (cigars), 7 Col. App. 78, 42 Pac. 1016; *Stiff v. Fisher* (cattle), 2 Tex. Civ. App. 346, 21 S. W. 291. Again, though the goods promised were a specific stock of goods then in store (*Carland v. Cunningham* 37 Pa. St. 228), or a certain promissory note, the measure of damages being the difference between the contract price and the face of the note with interest. *Dirickson v. Showell*, 79 Md. 49, 28 Atl. 896. Again the attachment was held available on a quantum meruit for the use of vessels and for demurrage. *Roelofson v. Hatch*, 3 Mich. 277. Again in an action for damages for failure to sell as agreed land purchased by plaintiff through defendant in consideration of such agreement. "The amount to be paid is fixed by the terms of the contract, or can be readily ascertained from the information it affords." It is "the difference between the value of the land at the end of the year and the amount which the defendant bound himself to realize from it for the plaintiff." *Dunn v. Mackey*, 80 Cal. 104, 22 Pac. 64. Again attachment was held available in an action for damages for failure to tow a certain keelboat up Red river and deliver corn at certain places. *Jones v. Buzzard*, 2 Ark. 415. Again, for failure to scale logs, thereby preventing plaintiff cutting them and causing him expense by the delay. *Messinger v. Dunham*, 62 Ark. 326, 35 S. W. 435. Again, attachment was held available in covenant for failure to build a mill and pay \$1500 for a warranty deed which had been tendered. *Barber v. Robeson*, 15 N. J. L. (3 Green,) 17. Again, in debt for goods sold and delivered and for failure to pay an accepted draft including \$25 attorney fees occasioned by such failure. *Waples P. G. Co., v. Basham*, 9 Tex. Civ. App. 638, 29 S. W. 1118.

Attachment was Held Not Available on facts very much like *Wilson v. Louis Cook Mfg. Co.*, except that the contract was to sell clothing by sample. *Hochstadler v. Sam.* 73 Tex. 315, 11 S. W. 408. This is also an excellent case for the student to read. Again, for refusing to employ a ship according to charter party whereby the owner was to have £670 per month as long as the voyage named should require. *Clark v. Wilson*, 3 Wash. C. C. 560, Fed. Cas. No. 2841. This is a leading case. Again, for refusing to deed and deliver several parcels of land subject to separate incumbrances, and certain bonds and stocks in exchange for others held by plaintiff. *Hough v. Kugler*, 36 Md. 186. Again, for delay in selling a cargo of flour and failure to invest the proceeds in a cargo of coffee as agreed. *Warwick v. Chase*, 23 Md.

154. Again, for failing to mine at least 10,000 tons per annum and pay \$2 per ton royalty. *Heckscher v. Trotter*, 48 N. J. L. 419, 5 Atl. 581. Again, for failure of title to a patent sold to plaintiff. *Mills v. Findlay*, 14 Ga. 230. Again, for failure to ship a stock of boots and shoes to plaintiffs, who had rented a store to engage in business. *Hoover v. Hathaway*, 20 Dist. Col. (9 Mackey), 591. Again, for value of iron defendant agreed to carry safely but lost. *Hazard v. Jordan*, 12 Ala. 180.

While the decisions above named are not all reconcilable the courts rendering them claim to follow the rule announced in *Fisher v. Consequa* above, and in the main they are in harmony with *Wilson v. Louis Cook Mfg. Co.*

Uncertainty Immaterial. In several cases it is declared that uncertainty as to the amount of plaintiff's demand is no objection and the attachment sustained. See following. For negligently towing a raft of logs; *New Haven S. S. Co. v. Fowler*, 28 Conn. 103; negligently carrying goods; *Lenox v. Howland*, 3 Caines, N. Y., 257, 323; or for a defect in a grain drill sold and warranted to plaintiff; *Baumgardner v. Dowagiac Mfg. Co.*, 50 Minn. 381, 52 N. W. 964; or for refusing to accept and pay for a stock of hardware at agreed price; *Lord v. Gaddis*, 6 Iowa 57; or for damages on an attachment bond; *Withers v. Brittain*, 35 Neb. 436; 53 N. W. 375; or for breach of promise to marry, attachment being given on "all money demands," *Morton v. Pearman*, 28 Ga. 324; or for unpaid duties on silks smuggled; *U. S. v. Graff*, 67 Barber (N. Y.) 304. See also *Steen v. Norton*, 45 Wis. 418.

In Louisiana it is said attachment is given to recover a debt and an action may be in the debit or the detinet, "which is on an express agreement to deliver any specific property." Therefore attachment lies in an action against a carrier for loss of goods; *Hunt v. Norris*, 4 Martin (La.) 517; and in an action for failure to bind and return books. *Turner v. Collins*, 1 Martin, N. S. 369.

If the penalty named in a bond is to cover such damages as the party may become entitled to, and not to liquidate the damages, attachment does not lie unless the damages are so certain in amount as to comply with the rule announced in the text. *Brown v. Hoy*, 16 N. J. L. 157; *Cheddick v. Marsh*, 21 N. J. L. 463; *State v. Beall*, 3 H. & M. (Md.) 347, *Hough v. Kugler*, 36 Md. 186.

Amount of Final Recovery. "And though the defendant may contest the demand upon him, or may show that no damage has in fact been sustained by the plaintiffs, that does not affect the question whether the contract supplies the plaintiff a measure of damages to which he can make affidavit." *Dirickson v. Showell*, 79 Md. 49, 28 Atl. 896.

HAWES v. CLEMENT.

64 Wisconsin 152, 25 N. W. 21. (1885)

Character of Demand—Accounting Necessary to Find Amount—Intervention—Who Raise Question.

Motion by Clement and five other execution creditors of Boyd to vacate an attachment of Boyd's property, levied in an action by Hawes against Boyd, and a counter motion by Hawes that the property be used in satisfaction of his judgment. The circuit court denied the motion by Clement *et al.* and granted Hawes's motion. Clement *et al.* appeal. Reversed.

The principal ground for the motion to vacate was that Hawes's claim was of such a nature that an attachment could not lawfully issue in an action to enforce it.

Fethers, Jeffris & Smith, for appellants.

Carpenter & McGowan and Wm. Ruger, for respondent.

The Court by Lyon, J. The moneys in the hands of the sheriff, being the proceeds of the sale of the attached property, are under the control of the court, and doubtless the court may inquire and determine who is entitled thereto, and order the same paid over to the person or persons so entitled. The procedure to that end, in form, is in the action of Hawes v. Boyd, [*154] yet, in substance and effect, it is not strictly in that, or in either of the actions against Boyd, but is rather in the nature of a special proceeding growing out of and founded upon all of those actions; to which proceeding all the attaching creditors of Boyd (and perhaps Boyd also) are parties. If the respondent's attachment was valid, he is entitled to have his judgment paid first out of such moneys. If his attachment is not valid, the appellants, the other attaching creditors of Boyd, are first entitled to have the moneys applied in payment of their judgments in due order of priority. Manifestly the appellants may, in some proceeding, litigate and have determined the question of the validity or invalidity of such attachment. Regarding substance rather than mere form, we think they have adopted an effectual procedure to obtain an adjudication of that question. If authorities are required to a proposition so reasonable and just, they may be found cited in the notes to sec. 275, Drake on Attachment. * * *

The cause of action stated by the respondent in his action against Boyd is to the effect that in March, 1884, he delivered to Boyd goods, wares, and merchandise of the value of \$7,814.83 to be sold by the latter for him at Janesville. * * * [*155] * * *

The complaint concludes with the following averments: "This plaintiff further shows that he is unable to state what, if any, portion of said goods so delivered by this plaintiff to said defendant to be sold as aforesaid, remain unsold; and this plaintiff will be unable to state the exact amount till after he takes an inventory of the goods remaining unsold and belonging to this plaintiff; and this plaintiff further shows that the balance of said goods so delivered to said defendant and remaining unsold, or sold and unaccounted for, is the sum of \$6,845.18, with interest from the said 14th day of July, 1884." Judgment is demanded for the sum last named.

It is essential to a valid execution of a writ of attachment that the affidavit annexed thereto should state not only a statutory cause for issuing the writ, but also the amount of the defendant's indebtedness to the plaintiff "as near as may be, over and above all legal set-offs." R. S. § 2731. The statement of the amount of such indebtedness is a most vital one. For the purposes of the execution of the writ it imports absolute verity, because it is not traversable in a proceeding by traverse to dissolve the attachment. R. S. sec. 2745. Such statement is the guide to the officer executing the writ as to the amount of property he ought to seize in order to secure the plaintiff. Hence it is required for the protection of the debtor, and of his other creditors as well.

Considering the importance of such statement, it necessarily and logically follows that if the cause of action be of such a character that it is impossible for the plaintiff or [*156] his agent to know the amount of such indebtedness, no attachment founded upon it can be lawfully executed.

Taking the most favorable view for the respondent, *Hawes*, of the transactions between himself and Boyd, and we have this state of facts: *Hawes* delivered his goods to Boyd, in trust that Boyd would sell them and pay over to him the proceeds of the sales, less one half the net profits. In stating the indebtedness,

Hawes included nothing for profits. He merely claimed the value of the goods delivered to Boyd, less payments. We may therefore exclude from consideration any question of the amount of profits. But in order to ascertain the amount of Boyd's indebtedness to *Hawes* at any given time, it was necessary to know what amount Boyd had realized for such of the goods as he had theretofore sold. It was not sufficient to know merely what goods he had sold, for the value thereof is not the measure of his indebtedness. It is the amount realized which, under the contract mentioned in the complaint, measures the liability of Boyd. Hence, before *Hawes*, or any one for him, could state the amount of Boyd's indebtedness, it was necessary to have an accounting of the goods sold and the prices realized therefor. Because the respondent's attachment was sued out and executed before any such accounting was had, and before he or his agent knew, or could know, the amount of Boyd's indebtedness (all which sufficiently appears in the complaint in that action), it must be held that the respondent obtained no lien upon the property attached, as against the appellants, who subsequently attached the same property. * * * [*159] * * *

It results from the views above expressed that the order of the circuit court, that the respondent's judgment and execution be first paid out of the moneys in the hands of the sheriff, must be reversed, and the cause remanded with directions that such moneys be first applied in satisfaction of the appellants' judgments and executions in due order of priority.

By the Court. It is so ordered.

Partnership Accounting.—"This, then, is a suit for the liquidation and settlement of a partnership, the ascertainment of the balance and decree therefor. It is true that the plaintiff professes to have calculated and to his own satisfaction ascertained the balance; but it is quite obvious that the partnership affairs involve mutual items of debit and credit, numerous and diversified in their nature. * * * It would seem impossible under the showing of the petition itself, and especially as it does not allege that any accounts have been rendered, nor any balance of account actually struck by the partners, that the plaintiff should be able to declare with certainty, the amount which, on a final liquidation and settlement of these affairs, will be found due to him. * * * We do not, however, wish to be considered as laying

down the rule that, in no case of joint adventure can a partner proceed by attachment. Suits may occur in which the business of the adventure may be so limited and simple in its features, as to exhibit a case where the party might be considered as able to swear to a positive and precise balance." Decree dissolving the attachment affirmed. *Brinegar v. Griffin*, 2 La. An. 154. To same effect. *Johnson v. Short*, 2 La. An. 277; *Barrow v. McDonald*, 12 La. An. 110; *Treadway v. Ryan*, 3 Kan. 437; *Rice v. Beers*, 1 Rice's Dig. of S. Car. Rep. 75; *Ackroyd v. Ackroyd*, 11 Abbott Prac. (N. Y.) 345, 20 How. Prac. 93. But see *Humphreys v. Matthews*, 11 Ill. 471. In Georgia and California the point has been made, but the attachments were sustained on the ground that the parties were not in fact partners. *Wheeler v. Farmer*, 38 Cal. 203; *Holloway v. Brinkley*, 42 Ga. 226.

An excellent argument by Ewing, C. J., to the effect that attachment does not lie if the amount is not sufficiently certain to enable the court to fix the amount of bail which the defendant must give to dissolve the attachment, will be found in *Jeffery v. Wooley*, 10 N. J. L. (5 Halsted) 145. In that case the attachment in an action on a plea of covenant was quashed because it did not appear from the attachment affidavit or other proceedings in the action that the covenant broken was of such a nature that the plaintiff's damages for the breach of it would be certain. "The jurisdiction must be shown not presumed."

PETRIE v. PAINE.

9 Vermont 271. (1837)

Ground for Attachment—Statutory Exigency Necessary—Who Object.

Action by Emerson & Petrie against Nathan Paine as trustee of George Petrie, principal debtor. Judgment for the trustee. Plaintiffs excepted and the cause passed to this court. Affirmed.

W Upham, for plaintiff.

L. B. Peck, for trustee defendant.

The Court by Collamer, J. The trustee interposed a plea in bar, that Geo. Petrie was not an absconding or concealed debtor. The county court refused, on motion, summarily, to dismiss this plea, to which the plaintiff excepts, as error. * * * The plaintiff insists, that the trustee had no right to make this plea in his own behalf, but only in behalf of the principal debtor, after confessing himself trustee. The plea, on its face, purports to be the plea of the trustee, in his own right. * * * [*274] * * *

The statute prescribes a form for the process, in which the plaintiff alleges, that the principal debtor is absconded or concealed, and that the trustee has effects, etc., and calls on him to answer, etc. This statute clearly interferes with the common law

rights of the trustee, in many important particulars. It subjects him to the process of a stranger, with whom he has no privity. It calls him into court, when his creditor does not desire it. It subjects him to personal disclosure. It enables the court, on that disclosure and other evidence, to give a judgment against him. * * * It is not to be supposed this was intended to be done, but in a case of real necessity, such as is clearly within the statute. The statute, very clearly, subjects no man to this, but in the case of an absconding or concealed debtor. * * *

It is said the principal debtor may make this same plea, but his neglecting or refusing does not deprive the trustee of so doing. * *

Judgment affirmed.

In the following attachment cases garnishees pleaded that plaintiffs' demand was not one on which attachment was allowed. *Hoover v. Hathaway*, 20 Dist. Col. (9 Mackey), 591, *Warwick v. Chase*, 23 Md. 154. But under many statutes garnishment is a remedy independent of attachment and therefore available though attachment might not be.

WILEY v. SLEDGE.

8 Georgia 532. (1850)

Ground for Attachment—As to Part Only of Defendants—Right to Several Action—Death of Partner.

Attachment by L. M. Wiley & Co. against Sledge for a debt due plaintiff from Birdsong & Sledge, partners, on the ground that Sledge was removing from the state. From a judgment quashing the attachment plaintiffs appeal. Affirmed.

H. Holt, for plaintiffs.

W. Dougherty, for defendants.

The Court by Lumpkin, J. The only question in this case is, whether, when one of the members of a firm, transacting business in Georgia, resides out of the state, an attachment will lie against him on a firm debt, to be levied on the partnership effects?

The case is not without its difficulties. We think, however, that the attachment will not, ordinarily, lie. This summary remedy is allowed only against the *debtor* of the plaintiff in attachment. Here the *debtor* is the *firm* of Birdsong & Sledge, and not Nathaniel Sledge, individually. For this simple reason alone, it would seem that this proceeding could not be sustained. It is not

authorized by the language of the law. Partners must be sued jointly; and while there is no process [*533] of *outlawry* in civil cases in Georgia, the return of *non est inventus* has, under the act of 1820, (*Prince*, 445), pretty much the same effect. Still, the action must be *joint*. An attachment is a suit. Why should the plaintiff be permitted, in this form of proceeding, more than by ordinary process, to go against one partner separately?

In Alabama, it has been decided that a *non-resident* partner may be attached, although there is one of the firm resident in the state. *Winston v. Ewing*, 1 Ala. 129. *Green v. Pyne*, *Ibid*, 235. *Conklin v. Harris*, 5 Ala. 213. But these cases are put by the court upon the attachment law of that state, which makes the debts of partners joint and *several*, allowing a remedy against either. *Aikin's Digest*, 268.

The remedy by attachment is allowed in this state, because the ordinary process of law cannot be served on the debtor. If personal service can be effected, then the attachment cannot issue. Here, notwithstanding the non-residence of one of the firm, suit, under the Act of 1820, can be prosecuted to judgment against the partners who live in the state, and the judgment will bind the partnership effects, as well as the individual property of the partners who are served. A debtor may fraudulently remove his property from the state, for the purpose of defeating his creditors, yet if he remain himself, an attachment will not lie; and why? Because a *ca. sa.* would coerce the surrender of the property thus eloiigned.—The same result could be obtained by ordinary suit against the resident partner. The law may be defective in not providing for this case, as has been done in our sister state. It is not for us to remedy the evil.

We do not hold that a state of things might not exist which would authorize an attachment against one or more *non-resident* members of a firm on a copartnership contract—as, for instance, the death of the resident partner or partners. Suffice it to say, that the record presents no such circumstances.

Judgment affirmed.

In some states statutes exist making all joint debts joint and several, thus enabling suit against any one of the debtors; and under these

it is held that in an action against all any ground for attachment existing against one enables an attachment of his property. *Board of Comm'rs of Jefferson Co. v. Swain*, 5 Kan. 376; *Searcy v. Platte County*, 10 Mo. 269; *Franciscus v. Bridges*, 18 Mo. 208. And in some states this enables the attachment of the interest of both in their joint property. *Williams v. Muthersbaugh*, 29 Kan. 730; *Cohen v. Gamble*, 71 Miss. 478, 15 South. 236.

Though the singular number, "debtor," be used in the statute, attachment lies against joint debtors if ground for attachment exists against all; but one of several joint debtors could not be sued alone by attachment merely because ground for attachment does not exist as to others. *Kouns v. Brown*, 18 Ky. (2 T. B. Mon.) 146. But if the obligation is joint and several he may be. *Leach v. Swann*, 8 Blackf. (Ind.) 68.

In Kentucky the statute allowing attachment to issue against "a defendant or several defendants who or some of whom" have absconded or fraudulently disposed of property, etc., is held to enable attachment of the property of all when one absconds. *Mills v. Brown*, 2 Metc. 404; *Duncan v. Headley*, 4 Bush. 45.

But in Michigan under a similar statute the court by Judge Cooley held that only the property of the partner attempting to defraud his creditors could be attached. *Edwards v. Hughes*, 20 Mich. 289. Same point, *Bogart v. Dart*, 25 Hun (N. Y.) 395.

The fact that some of the non-resident defendants were found and personally served is no reason for dismissing an attachment issued on the ground of non-residence. *Jackson v. Perry*, 52 Ky. (13 B. Mon.) 231.

Curtis v. Hollingshead, 14 N. J. L. (2 Green) 402, contains an elaborate argument by Hornblower, C.J., of the point that the statute allowing attachment because the defendant is a non-resident or has absconded does not mean that the defendant or part of the defendants are non-residents, etc. To the same effect see *Corbit v. Corbit*, 50 N. J. L. 363; *Remington v. Howard Express Co.*, 8 R. I. 406, *Cowdin v. Hurford*, 4 Ohio, 133; *Taylor v. McDonald*, Id. 150; *Wilson v. Circuit Judge*, 82 Mich. 169, 46 N. W. 439; *Leach v. Cook*, 10 Vt. 239.

In New York, under a statute providing: "That whenever any person, * * * being indebted within this state shall either secretly depart from or keep concealed within the same," etc., his creditors may attach (*Laws of N. Y. 1813*, p. 157), it was held that in an action against partners for a partnership debt the property of one who had absconded might be attached though the other defendants resided within the state and were capable of being arrested. *Matter of Chipman*, 14 Johns. 217. A similar decision was reached in Wisconsin under a similar statute (*Bank of Northwest v. Taylor*, 16 Wis. 638), and again in Iowa in which *Wright, C.J.*, giving the opinion of the court, very ably discusses the question overruling several prior decisions of the same court to the contrary. *Chittenden v. Hobbs*, 9 Iowa, 417. I believe *McHaney v. Cawthorn*, 4 Heisk. (Tenn.) 508, is to the same effect,

though I have not access to the statute. But the partnership property could not be attached in such a case, for the remaining partners have a right to retain it to pay partnership debts. In *re Smith*, 16 Johns. 102. But his interest in the property, what might be left after final accounting, could be attached. *Staats v. Bristow*, 73 N. Y. 264. If the defendants were not partners such an attachment takes the undivided interest of the defendant against whom ground for attachment exists, and it is held that the sheriff may retain possession though the attachment was issued against all and quashed as to the others for want of grounds. *Bank of Northwest v. Taylor*, 16 Wis. 638. When the partnership through one of the partners was fraudulently disposing of the assets it was held that attachment lay against the firm property. *Wilson Obear G. Co. v. Cole*, 26 Mo. App. 5. But when the partnership obtained the credit on the fraudulent representation of one partner who made the purchase it was held that the individual property of the innocent partner could not be attached in a suit against the firm for the debt it had thus fraudulently contracted. Opinion by Hooker, J., Long and Grant, JJ., concurring, Montgomery, J., and McGrath, C.J., dissenting. *Jaffray v. Jennings*, 101 Mich. 515, 60 N. W. 52.

Ground for Attachment as to All but not Same Ground. When one cause for attachment existed against one partner and another cause existed against the other an attachment of the firm property in an action against the firm was sustained though neither ground existed against both. *Sellew v. Chrisfield*, 1 Handy (O.) 87. See also *Starr v. Mayer*, 60 Ga. 546; *Bank of Northwest v. Taylor*, 16 Wis. 638.

MEYER v. EVANS.

27 Nebraska 367, 43 N. W. 109. (1889)

Character of Demand—Part Proper, Part Not, Effect—Good Faith.

Action by Max Meyer *et al.* against F. B. Evans. From judgment of the district court discharging certain attachments of Evans's property plaintiff brings error. Affirmed.

Charles Ogden, for plaintiff.

W. S. Shoemaker, for defendant.

The Court by Cobb, J. * * * It appears that the plaintiffs were wholesale dealers in Omaha, and the defendant a retail purchaser on credit. On [*368] February 1, 1887, the defendant purchased of plaintiffs a bill of goods amounting to \$8.50 on credit, without question or representation of any kind. On February 2, following, he purchased a larger bill amounting to \$245.70 on fraudulent representations, it is claimed by plaintiffs and denied by the defendant, and, on the following day, a third bill of

\$8.50; total, \$262.70. * * * [*371] * * * The county court found that the defendant had fraudulently contracted a portion of the debt on which the attachments had been issued, but that another portion, \$8.45, was contracted prior to the time that any fraudulent representations had been made by defendant, and therefore the attachment did not obtain, according to law, and was discharged. The district court affirmed this decision.

The case, in this court, presents the same question as that of *Mayer v. Zingre*, 18 Neb. 458, in which the attachment was discharged for want of grounds covering the whole debt. Counsel for plaintiffs in error seek to distinguish it from that case from the fact that that attachment was for \$381.20, while the grounds of attachment set up in the affidavit of the plaintiffs, only applied to \$51.09 of the debt; and in the case at bar it is argued that out of \$262.70, the grounds of attachment found by the county court, and affirmed by the district court, apply to all but \$8.45, and counsel claims that this comparatively insignificant item falls within the rule of the maxim *de minimis non curat lex*, "the law takes no notice of extreme trifles."

While it is not impossible that a case might arise in which it would be so apparent that an insignificant item had unintentionally been added to the amount sued for, which did not fall within the grounds of attachment, that it might [*372] properly be rejected, and the claim purged by the plaintiff to that which should have been the initial claim, it does not seem apparent that proceedings can be sustained for any sum, however insignificant, for which no grounds of attachment are claimed, simply on account of its being merged and found in another claim for which sufficient grounds of attachment do exist. The judgment of the district court is affirmed.

Judgment affirmed.

This case goes as far as any I have seen, but a majority of the decisions seem to be in harmony with *Meyer v. Evans*. See *Willman v. Freidman*, (Idaho) 35 Pac. 37; *Wilson v. Harvey*, 52 How. Prac. (N. Y.) 126; *Estlow v. Hanna*, 75 Mich. 219, 42 N. W. 812; *Stiff v. Fisher*, 85 Texas, 556; *Smith Drug Co. v. Casper Drug Co.* 5 Wyo. 510, 40 Pac. 979.

While recognizing the rule announced in the above cases, *Mackey v. Hyatt*, 42 Mo. App. 443, is not reconcilable with *Meyer v. Evans*. It was on similar facts and attachment was sustained, the court saying:

It is "a debt in solido and not severable. It is a running account for merchandise, and an action on any part of it would bar an action for the balance. * * * When we admit that part of an indivisible debt was contracted in fraud, we may say the entire debt was." See also *Dawson v. Brown*, 12 Gill. & J. (Md.) 53; *Gross v. Goldsmith*, 4 Mackey (D. C.) 126.

The fact that Plaintiff Fails to Recover as Much as He Swore to be due is not ground for dismissing the attachment (*Brewer v. Ainsworth*, 32 Ga. 487; *Sackett v. Partridge*, 4 Iowa, 416; *Mendes v. Freiters*, 16 Nev. 393; *Donnelly v. Elser*, 69 Tex. 282, 6 S. W. 563; *Dirickson v. Showell*, 79 Md. 49, 28 Atl. 896); unless more is intentionally claimed than he expected to be able to recover. *Tucker v. Green*, 27 Kan. 355; *Hale v. Chandler*, 3 Mich. 531, and cases cited therein.

EMERSON v. DETROIT STEEL & SPRING CO.

100 Michigan 127, 58 N. W. 659. (1894)

Attachment—Affidavit, Disjunctive—Amount Due—Fraudulently Contracted—Equity Jurisdiction.

Bill by assignee for benefit of creditors to set aside attachments against the assignor, for irregularities and for want of grounds for attachment. Defendants appeal. Decree modified.

Thomas A. Wilson, and *Edwin F. Conely*, for complainants.

Moore & Moore and *Wm. H. Wells*, for defendant.

The Court by Montgomery, J. * * * The defendants contended that the court of chancery has no jurisdiction to set aside an attachment at the suit of an assignee for the benefit of creditors. * * * [*130] It is settled that a subsequent attaching creditor may have relief in equity against an unauthorized attachment by another. *Hale v. Chandler*, 3 Mich. 531; *Hinchman v. Town*, 10 Id. 508; *Edson v. Cumings*, 52 Id. 52. And we are convinced that an assignee for general creditors should have the same remedy. Any other rule would result in this: That property seized by an unauthorized attachment may be reached by a subsequent attaching creditor, but it cannot be distributed *pro rata* among all creditors. It is suggested that the assignee has the right to intervene in the suit at law, but the contrary was held in *Gott v. Hoschma*, 57 Mich. 413. See, also, *Rowe v. Kellogg*, 54 Mich. 206.

Numerous objections are made to the regularity of the attachment proceedings.

The affidavits, after stating that defendant is justly indebted

to the plaintiff upon contract, etc., each state that the defendant fraudulently contracted the debt *or* incurred the obligation respecting which the suit is brought, using the language of the statute. It is contended that the use of the disjunctive "or" renders the affidavit invalid. We hold the affidavit sufficient in this respect. The incurring of an obligation under the statute can be nothing other than contracting an indebtedness, in a case [*131] where the suit is brought, as it must be under the statute, upon contract, and where the affidavit shows that it is brought upon contract. If the defendant incurred an obligation, it was an obligation to pay money. Each phrase expresses the same thing in a different way. The distinction between the cases where the use of the disjunctive renders the affidavit invalid and those in which it does not is well stated in Drake on Attachments, at section 102: "Where the disjunctive 'or' is used, not to connect two distinct facts of different natures, but to characterize and include two or more phases of the same fact, attended with the same results, the construction just mentioned (that is, rendering the affidavit void for uncertainty) would be inapplicable." See, also, cases cited in note, and Wap. Attachm. p. 98.

It is suggested that an expression in one of the affidavits, stating that the debt is due to plaintiffs from defendant "upon express contract and implied contract," is as indefinite as the use of the word "or" would be. We do not see how this can be maintained. The statement shows affirmatively the indebtedness, and that the same is due upon express and upon implied contract. The question is ruled by *Buehler v. De Lemos*, 84 Mich. 554. * * * [*132]
* * *

The next question was whether there were grounds for attachment. We think there was sufficient to show that the indebtedness was fraudulently contracted. It sufficiently appears that Dun's reports were based upon the sworn reports of the company to the secretary of state; that both the plaintiffs in attachment extended credit upon the strength of these reports; and we are satisfied that these statements of the company were false, and could have been made with no other purpose than that of establishing a false credit. * * * [*133] * * *

It is contended by the complainants that the defendants, by including a demand not due, debarred themselves from priority as to all of their demand. There is nothing to indicate any fraudulent intent on the part of the plaintiffs in attachment in averring the amount of their claims. There was certainly no collusion between them and the debtor. We think, under the circumstances, the question is ruled by *Hinchman v. Town*, 10 Mich. 508. See, also, *Dawson v. Brown*, 12 Gill & J. (Md.) 53; *Boarman v. Patterson*, 1 Gill (Md.) 372; and *Gross v. Goldsmith*, 4 Mackey (D. C.) 126. It would render proceedings in attachment very precarious if it should be held that, in averring the amount due, the entire attachment should fail if, upon a subsequent trial of the question of fact, it should be determined, either as [*134] a matter of law or a matter of fact, that the plaintiff in attachment was mistaken.

The decree of the court below will in each case be modified. The plaintiffs in attachment will be declared entitled to a lien under their attachment. * * *

JACKSON v. BURKE.

51 Tennessee (4 Heiskell) 610. (1871)

Ground for Attachment—Disposing of Property—Allegation and Proof.

Bill *quia timet* by J. A. Jackson against Jas. M. Burke, accompanied by an attachment. From a decree discharging the attachment complainant appeals. Affirmed.

R. P. Rains, for complainant.

McDearmon, for defendant.

The Court by Sneed, J. * * * The grounds upon which the complainant asked the attachment are set forth in the bill as follows, after stating that since the complainant became so bound [*612] as surety, he, “the defendant, has become dissipated, careless, almost an entire sot—has become otherwise greatly in debt, and is becoming daily more so, produced by his daily dissipated habits, and is now utterly insolvent: he charges that *he has reasons to believe, and does believe, that he, the defendant, will convey and dispose of his groceries and his articles in his said grocery, in order to defraud his creditors.*”

Although the attachment laws are to be liberally construed,

so far as they regard the application of the remedy, yet so far as they prescribe the causes for which an attachment may issue, no material departure from the specific requirements of the statute has ever been tolerated by this court. The remedy is in derogation of the common law—harsh and summary in its operation, and very liable to be used as an instrument of injustice and oppression. It was intended as a means of counteracting the devices and machinations of fraud and dishonesty, and in the line of its legitimate mission it is, and it should be, liberally construed and enforced. It was never intended that a debtor pursuing his ordinary avocation, however improvident or thriftless he might be, should have his property seized by attachment, unless he had placed himself beyond all doubt within the provision and meaning of the statute. And even where a clear case is made, by affidavit, if the defendant take issue and traverse the grounds alleged in the affidavit, the burden of proving their verity lies upon the complainant. Nor is the phraseology used in [*613] prescribing the various grounds upon which this remedy is allowed, of uncertain or doubtful construction. The words are of the plainest import, and admit of but one interpretation.

The bill in this case cannot be sustained as an attachment bill, because neither one of the grounds which the statute prescribes is alleged in the bill. The words that “the complainant believes and has reason to believe that the defendant *will convey and dispose* of his groceries and his articles in said grocery, in order to defraud his creditors,” do not import that he is about fraudulently to dispose of his property. The affidavit must show that the defendant *has* fraudulently disposed of his property, or that he is *about* to do so. These words *about* fraudulently to dispose of his property, import an exigency by which the creditor’s debt is in peril of immediate loss unless this extraordinary remedy is awarded to him. Not an act which may peradventure be done at some future time, but a fraudulent act on the very eve of consummation. The mere opinion of the complainant that the defendant will do a fraudulent act, does not import that he is about to do it—or that the act is about to be done—but that it will be done at some future and indefinite day. The law requires the allegation of an act, not

an intent—an act which though not yet consummated, is presently to be done. We do not say that some form of expression might not be adopted which would be equivalent to charging in the words of the statute—but it is safe to give the [*614] very words of the statute, as the meaning of those words is unmistakable. The defendant has a right to a specific charge, that he may have an opportunity to traverse it. If it be charged that he is about to do an act, he can take issue upon the charge and make his defense accordingly. But if it be charged that he *will* do it, upon the defendant's taking issue, how could the plaintiff, upon whom the burden of proving it lies, establish such a fact? The defendant would scarcely be called upon to defend against the mere contingencies and eventualities of the future. * * *

The decree is affirmed.

ORDENSTEIN v. BONES.

— Arizona Ter. —, 12 Pac. 614. (1887)

Character of Demand—Contracted or Payable in State—Effect of Acknowledgement.

Attachment by Ordenstein against Bones and his partner. From judgment dissolving the attachment plaintiff appeals. Affirmed.

Herndon & Hawkins and *E. M. Sanford*, for appellants.

Rush Wells and *Howard*, for appellees.

The Court by Barnes, J. The statute (Comp. Laws, 2257) authorizes the issuing of an attachment writ where plaintiff sues to recover "an indebtedness upon a contract, expressed or implied, for the direct payment of money, and that such contract was made or is payable in this territory." Plaintiff in this case was a merchant doing business in California, and sold goods to defendants, who were living in this territory. It is admitted that such sale of goods was made in California, and that such contract would not support an attachment writ. After the sale was made, however, defendants, when pressed for payment, and being unable to pay then, were asked to acknowledge the debt, and did so in the following words, in writing:

PRESCOTT, November 16, 1885.

"The above balance, fourteen hundred and ninety-three 96-100 dollars, due Ordenstein & Co., is correct.

BONES & SPENSER."

This was written on an account for goods sold, at the place of business of defendants, in Prescott, Arizona. This writing is made the basis of this suit, and an attachment writ was issued on the ground that this latter writing is a contract made in this territory, and payable here.

We have been referred to many cases tending to show that an account stated was a new contract at common law, and that the above writing creates an account stated. At common law, when an amount due on an open account was agreed upon, then the law implied a promise to pay that particular amount. So, when goods were sold and delivered, the law implies a contract to pay the price for them. It is insisted that, being an account stated, it became an implied contract to pay, and, made in this territory, brings the action within the attachment laws. While much has been said and written by way of argument which sustains this view, yet a careful analysis of an account stated at common law leads to the conclusion that it amounts to a solemn admission of the fact of indebtedness, which, if proved, makes unnecessary other evidence of the indebtedness, rather than that it is a new contract.

It is said in *Chace v. Trafford*, 116 Mass. 532: "An account stated is an acknowledgment of the existing condition of liability between the parties. From it the law implies a promise to pay whatever balance is thus acknowledged to be due. It thereby becomes a new and unpaid cause of action, so far as that a recovery may be had upon it without setting forth or proving the separate items of liability from which the balance results." This case, therefore, treats it rather as an admission of a fact than as a contract, and the case decides that the statute of limitations begins to run from the date of the last item of the account. The account stated is not a new promise, to bring an account within the statute

of limitations. To the same effect is *White v. Campbell*, 25 Mich. 463.

If an account stated is not a new promise, to bring an open account within the statute of limitations, *a fortiori*, it is not a contract made in this territory, for goods sold out of the territory, to sustain an attachment. This is a summary remedy, and a plaintiff must clearly come within its provisions to invoke its powers. *Eck v. Hoffman*, 55 Cal. 502; *Dalton v. Shelton*, 3 Cal. 206. By the paper sued on in this case the defendants simply say: "The above balance due is correct." This is a solemn admission of indebtedness, which could only be questioned for mistake or fraud; but it is simply an admission by defendants that they owe plaintiff a certain amount for the goods sold as stated in the account. The parties intended no more than that. *Gooding v. Hingston*, 20 Mich. 441. There is a broad distinction between an "admission" and a "contract." Nothing short of a contract made or payable in this territory gives the right to a writ of attachment. We do not think this paper is more than an admission of indebtedness. It does not change the nature of the old contract, or make a new one in this territory, but it dispenses with proof of the account.

The judgment of the district court dissolving the attachment is affirmed.

"It is argued that, although the contract was not made nor by its terms payable in this state, yet because the defendants reside here and the action is transitory, that therefore it is payable here and entitled to the attachment." Held contra. *Dulton v. Shelton*, 3 Cal. 206. *Trabant v. Rummell*, 14 Ore. 17, 12, Pac. 56. See also in *Matter of Fitch*, 2 Wend. (N. Y.) 298.

When not expressly so restricted, attachment and garnishment are available though the debt sued on was contracted and payable elsewhere (*Fisher v. Consequa*, 2 Wash. C. C. 382, Fed. Cas. No. 4816), and both parties are non-residents of the state (*Newland v. Circuit Judge*, 85 Mich. 151, 48 N. W. 544; *Sheldon v. Blauvelt*, 29, S. C. 453, 7 S. E. 593, 1 L. R. A. 685; *Mitchell v. Shook*, 72 Ill. 492), and the ground of attachment is that defendant is a non-resident. *Payne v. First Nat. Bank*, 16 Kan. 147.

WACHTER v. FAMACHON.

62 Wis. 117, 22 N. W. 160. (1885)

Ground for Attachment—Fraudulently Incurring Obligation—Obligation Defined.

Attachment by Wachter against Famachon. From a judgment dismissing the attachment plaintiff appeals. Reversed.

The trial was on a traverse of the attachment affidavit, which charged, as ground for attachment, that defendant fraudulently contracted the debt and had assigned, or was about to assign, his property to defraud his creditors.

Thomas & Fuller, for appellant.

Wilson & Provis and *W. H. Evans*, for appellee.

The Court by Orton, J. * * * From a careful examination and consideration of the evidence we are satisfied that as to the first cause assigned in the affidavits, the court erred, and ought to have found that the obligations were fraudulently incurred, and that as to the second cause the court found correctly. Either of these causes would sustain the attachments.

On the first ground, and as to the first above case, the evidence was substantially as follows: The defendant had been long engaged in the business of merchandising, milling, etc., and had apparently been doing a very large and successful business, and had enjoyed the general confidence and [*119] large credits, and was in possession of a large amount of property. He had given the plaintiff his note for \$1,000, which, on January 3, 1882, was past due, and the plaintiff wanted his money. The defendant desired to procure an extension of the time of payment, and to have the old note canceled, and to give a new note for the amount, to be payable one year from date. The plaintiff demanded a statement of his circumstances before entering into this new arrangement, and the defendant represented that he was perfectly good, and that his property was clear from incumbrance, with no mortgage or anything upon it; that he did not owe a great deal; and that the plaintiff's debt was as large as any he had. The defendant admits that at that time he owed a debt to one Tilmont of from \$17,000 to \$20,000; that he owed in all the sum of from \$60,000 to \$70,000; and that his property was not worth to exceed \$40,000.

* * * The plaintiff was wholly ignorant of these facts, and supposed from the statement of the defendant that he was in prosperous circumstances and solvent, and that he was not in debt to a very large amount; and, relying upon [*120] said statements, he consented to cancel the old note and take a new one for the same amount, payable one year from that date. The plaintiff testified that he would not have taken such new note, and so extended the time, had he not relied upon said statements, in ignorance of the facts. * * *

It was intimated on the argument that the learned judge before whom this case was tried did not doubt that the new credits had been obtained, and that the plaintiffs has been induced to take the new notes, by fraud, but held that by this transaction no new obligation had been incurred or any debt contracted. It is quite clear that the giving of the new note was not contracting a new debt. The debt was the [*121] \$1,000 in the first case and the \$5,000 in the other, the same in the new as in the old notes. But it is equally clear that a new contract can be made concerning the same debt. The new notes were new contracts of different terms from the old contracts. By the first contracts the debt was due, and by the new ones the debt is not due, and will not be for a considerable time to come, or until the time stipulated in the new contracts. Was the defendant bound by these new contracts or new notes? If so, he was *obligated*; for that means strictly, and in common parlance, *to be bound*. The obligation of the old notes was that they should be paid immediately or at once, for they were due. The obligation of the new ones is that they shall be paid in one year, or the longer time stipulated. Both parties were bound by the new notes. The plaintiffs could not enforce their payment until the time stipulated, and the defendant was under an obligation to pay them at maturity, and not before * * * [*124]

By the Court: The orders of the circuit court are reversed, and the causes remanded for further proceedings according to law.

As to what judgments executions may issue on, re-read: *Jasper v. Schlessinger*, ante, 3; *Brightman v. Merriwether*, ante, 8; *Locke v. Hubbard*, ante, 9; *Pennoyer v. Neff*, ante, 48; and *Roberts v. Connelley*, ante, 78.

3. AT WHAT STAGE OF THE CASE THE WRITS MAY BE ISSUED.

a. Attachments.

HARGAN v. BURCH.
8 Iowa 309. (1859)

How Early Process May Issue—Commencement of Action Defined—Attachment before Service on Defendant—Sunday Process.

Action commenced by attachment on open account. From judgment for plaintiff defendant brings error. Affirmed.

[*311] *The Court by Woodward, J.* The defendant's motion to quash the attachment was overruled, which is the first error assigned. We do not think the objection substantial. Section 1717 of the Code, directs the sheriff to note on the original notice the time of its receipt, and § 1663 enacts that the delivery of the notice to the sheriff, with the intent that it be served immediately, is a commencement of the action. But it will be noticed that this latter provision, is contained in the chapter, 99, which relates to the limitation of actions. The intention here is, that when the precise time of the commencement of an action becomes material, the fact referred to in § 1663, is made to define that time. The filing the petition, or the issuing the notice, might have been made the point, but these might take place without an intent to prosecute the action immediately, so that delivering the notice with intent to be served, is made the time to which to reckon, especially in the question of limitation. The action may, however, be fairly considered as begun, for other purposes, and, perhaps, to all common intents and purposes, when the petition is filed. At least, it seems consistent and reasonable to consider it so far commenced, as that part of its own process—such as a writ of attachment—may issue even before the notice. There is no harm, no wrong, effected by this. In truth there is no possible reason why the attachment

should not issue before the notice, save the provision that the attachment may issue at the commencement, or during the progress of a suit. Section 1846. And the force of this depends upon the construction to be given it. If sections 1663 and 1846 are to receive a rigid construction, so that there is no "commencement" of an action in any sense, nor to any purpose, but in the delivery of the notice, with intent to be served, then the writ of attachment cannot issue before the notice, and in the case at bar, it is irregular, and must be quashed. But such a construction does not appear to us necessary, and the attachment was well enough issued after the petition was filed, and before the notice. [*312] This course would compel the plaintiff to serve his notice before the next term of the court; for, if this should not be done, the attachment would then be quashed, of course, and the party suing out would render himself liable on his bond for suing out and levying an attachment without prosecuting an action.

We do not intend to intimate here that there may be any unnecessary delay, but the several steps should appear to be parts of the same transaction and proceedings.

In the present case, there is another fact which strengthens the position above taken. The attachment was sued on Sunday, and the affidavit required by statute in such case is made. Those things which were requisite for obtaining the attachment on that day were done, and none others, the party probably supposing that the issuance of process, or notice, would be illegal. This was issued, and put into the officer's hands the next day, which was as soon as was practicable. The case stands upon its own facts, and can scarcely serve as a precedent for one in other circumstances.

* * *

Affirmed.

"No court can be opened, nor any judicial business transacted on Sunday, except: * * * 4, and such other acts as are provided by law." [Iowa Stat. Rev. 1860, § 2686.]

"Where the petition states, in addition to the other facts required, that the plaintiff will lose his claim unless the attachment issues and is served on Sunday, it may be issued and served on that day." [Ch. 14, 10 Gen. Assembly; Code, 1873, § 2952.]

This case is cited and followed in the following cases similar to it except that the attachment was not on Sunday. *Bell v. Olmstead*, 18 Wis. 75; *Hoagland v. Wilcox*, 42 Neb. 138, 60 N. W. 376. See also to the same effect *Schuster v. Rader*, 13 Colo. 329, 22 Pac. 505; *Cosh Mur-*

ray Co. v. Tutlich, 10 Wash. 449, 38 Pac. 1134; McDonald v. Alanson Mfg. Co., 107 Mich. 10, 64 N. W. 730; Webb v. Bailey, 54 N. Y. 164; Blackman v. Wheaton, 13 Minn. 326, Gil. 299. "The chief utility of an attachment consists in the writ being served in time to prevent a delinquent debtor from placing his property beyond the reach of the creditor. It would be unfortunate, indeed, if the writ could not issue until the debtor should have notice of the proceedings by service of summons." Schuster v. Rader, *supra*.

PRACHT v. PISTER.
30 Kansas 568. (1883)

How Late Attachment May Issue—Effect of Late Attachment—Special Execution—Levy Defined—When Essential—Collateral Attack.

Action by Frederick Pracht against John Pister for possession of certain wheat sold plaintiff on process issued on judgment in favor of plaintiff against defendant. From judgment for defendant plaintiff brings error. Reversed.

Doster & Bogle, for plaintiff.

J. Hudson Morse, for defendant.

The Court by Brewer, J. On November 21, 1881, the firm of Pracht, Schutz & Co. recovered a judgment before a justice of the peace against the defendant for the sum of \$260.20. Of the validity of this judgment there is no question. In fact, the judgment was rendered upon the personal admission of the defendant. Thereafter, without issuing execution and for some inexplicable reason, the plaintiffs filed an affidavit for an order of attachment. The order of attachment was issued and levied upon certain personal property, to wit, fifty acres of growing wheat; and upon the determination of this attachment proceeding an order of sale was issued commanding the constable to satisfy the judgment by a sale of the property attached. Under this writ, it was sold to one of the plaintiffs in the judgment, and in the presence of and without any objection from the defendant.

The question now is, whether in a collateral proceeding the validity of this sale can be challenged by the defendant. We have in this state no form of execution prescribed by statute. [*572] The statute (Comp. Laws of 1879, ch. 81, § 139), simply directs what the execution shall contain, and the order of sale contains all the requisites of an execution prescribed by said section, except in this respect: that section provides that the process direct the offi-

cer to collect the amount of the judgment out of the personal property of the debtor. This order of sale, reciting a levy of an order of attachment upon the specific property, commands the officer out of said goods to cause the said judgment to be satisfied. In other words, instead of being a general execution commanding the officer to satisfy the judgment out of any personal property of the defendant, it was a special order commanding him to satisfy it out of a certain named property. Upon the process and in the presence of defendant the property was sold. No motion was made to set aside the process or the sale; in fact there was no direct attack upon the proceedings. The question is whether those proceedings were so irregular and defective that they must be adjudged void, and therefore open to collateral attack. It is conceded that the attachment proceedings amounted to nothing. The statute makes no provision for an attachment after judgment, nor indeed in such case is there any need of such proceedings. The only purpose of an attachment is to seize and hold the property until the claim of the plaintiff can be adjudicated. After judgment, an execution will seize anything that an attachment order would; so that the latter is unnecessary. Being therefore unauthorized by statute, and unnecessary, it may be disregarded. And the question really comes down to this: If the justice issues a writ commanding the officer to satisfy the judgment out of certain personal property, when he ought to have issued a writ commanding him to satisfy it out of any personal property, is this writ and a sale under it void? We think not. The greater includes the less. The power to command the seizure and sale of any personal property includes the power to seize and sell certain specific property—*Swiggart v. Harber*, 5 Ill. (4 Scam.) 364; *Rockwell v. Jones*, 21 Ill. 279; *Corriell v. Doolittle*, 2 G. Greene (Iowa) 385; [*573] *Paine v. Mooreland*, 15 Ohio 436; *Cooley v. Brayton*, 16 Iowa, 10; *Porter v. Haskell*, 11 Me. 177. Doubtless such an order is irregular, and could be set aside on motion; but if the defendant makes no objection, permits the sale under it, he should not be permitted thereafter to object that it is void. The defect is not a want of power, but a mere irregularity in proceeding; and in collateral proceedings mere irregularities are not sufficient to defeat the title. *Paine v. Spratley*, 5 Kas. 525; *Freeman on Executions*, § 343, and cases cited in the note.

But it is further objected, that under this order of sale the officer would make no levy; that the levy under the order of attachment was a nullity, and that a levy is indispensable to a valid sale. A levy means this and nothing more: the taking possession of property by the officer. When there is possession, absolute or constructive, there is a levy, and in any collateral proceeding it is enough that there was such possession. Here the only possession which could have been taken of the property was in fact taken under the order of sale. Now although such taking of possession was unauthorized, yet the officer could do no more if he had been authorized; and having taken such possession, and being in such possession, he made all the levy that was necessary to uphold his sale. He could have taken no further possession if a general execution had been placed in his hands. Hence we think that all the levy that was indispensable was in fact made. Freeman on Executions, § 274.

We therefore conclude that notwithstanding the defects, they were not sufficient to invalidate the proceedings as against a collateral attack. The judgment of the district court must be reversed, and the case remanded for a new trial.

All the justices concurring.

Reversed.

b. Executions.

As to issuing execution on the judgment before the record is made up or upon the order for judgment, prepare again upon *Jasper v. Schlessinger and Mayer*, ante, 3; *Brightman & Co. v. Merriwether*, ante, 8; and *Locke v. Hubbard*, ante, 9.

BACON v. CROUSEY.

7 New York (3 Selden) 195. (1852)

How Early Execution may Issue—Before Stay Expires—How Objection May be Made and by Whom.

Appeal by defendant from judgment of the supreme court in favor of plaintiff. Affirmed.

G. Stow, for appellant.

J. Romeyn, for respondents.

The Court by Jewett, J. The plaintiff brought this suit against the defendant for making a false return, as sheriff of the county of Rensselaer, to a writ of execution issued out of the court of common pleas of that county in his favor against the property of H. A. & G. R. Benton, to whom it was directed and delivered to be executed. The complaint alleges, that on the twenty-fifth day of June, 1847, the plaintiff recovered in the late court of common pleas of the county of Rensselaer a judgment against H. A. & G. R. Benton in debt for \$4,000, and \$32.72 damages and costs, and upon the same day issued and delivered to the defendant, then being sheriff of the county, a writ of execution for the collection of \$2,032.72, with interest from that day, by virtue of which the defendant on the same day levied upon the property of the defendant in the judgment, of sufficient value to satisfy it, but afterwards returned it, certifying that he could not find any property of the defendant to satisfy it; by which means, it is alleged, that the plaintiff was prevented from enforcing the payment or collection of \$1,542.93 thereof, with interest thereon from the eighth day of September, 1847, and which the plaintiff claimed to recover of the defendant. * * * [*198] * * *

The defence set up by the answer is, first, that the execution was issued within thirty days after the rendition of the judgment without the consent of the defendant therein, and without the authority of law; second, that there was nothing due from the defendant at the time of issuing the execution, nor was the [*199] sum of \$1,542.93 then due to the plaintiff as claimed by him; and, third, that the plaintiff had received promissory notes and bills of exchange and demands against third persons to the amount of \$1,000, which the defendant claimed should be set off against the plaintiff's demand.

As to the first branch of the defence, it appeared by the complaint that the execution was issued within thirty days after the recovery of the judgment. The answer sets up that it was illegally issued because the same was so issued without the consent of the defendant therein. The reply controverts this allegation; it says it was legally issued, with the consent of the defendant therein. The judge decided that the plaintiff was not bound to

prove that the defendant in the execution consented to its being issued within the thirty days. In that there was no error, for until set aside, although issued without the defendant's consent, the process was valid, and no one could take advantage of such an irregularity but the *defendant* in the execution. The judge was clearly right in his decision that the defendant was bound to execute it and could not take advantage of the fact in his defence that it was issued within the thirty days. *Jones v. Cook*, 1 Cow. 309; *Ross v. Luther*, 4 Cow. 158; *The Ontario Bank v. Hallett*, 8 Cow. 192; *Kimball v. Munger*, 2 Hill, 364; *Green v. Burnham*, 3 Sand. Ch. 110; *Pierce v. Alsop*, 3 Barbour Ch. 184; *Berry v. Riley*, 2 Barb. Sup. C. R. 307; *Williams v. Hogeboom*, 8 Paige, 469; *Parmelee v. Hitchcock*, 12 Wend. 96; *Stone v. Green*, 3 Hill, 469; *Rider v. Mason*, 4 Sand. Ch. 351.

The distinction is between *void* and *voidable* process; the *latter* is a justification to the officer, until it is set aside by the party. One strong reason why the sheriff shall not take advantage of the error in issuing the process is, that for aught that appears the party does not wish to avail himself of it. *Ames v. Webbers*, 8 Wendell, 545. But process which is *void*, the officer is under no obligation to execute, and he may in an action brought against him for refusing to execute it, set up its invalidity. *Cornell v. Barnes*, 7 Hill, 35. [*200]

I think the judge was right in holding that the defendant could not be permitted in order to reduce damages, to show that the execution directed the collection of a greater sum than was due to the plaintiff. It was for a sum less than the amount of the recovery, and the complaint alleges that the defendant levied on property of the defendant by virtue of it, sufficient in value to satisfy that amount, which fact for the purposes of this suit we have seen is admitted to be true. Clearly that sum with the interest must be taken as the measure of damages which the plaintiff sustained by the false return made by the defendant. The exclusion of the evidence offered by the defendant to show that the execution was issued in violation of a stipulation given by the plaintiff to the defendant in the execution, and that they made an assignment of all their property for the benefit of their creditors before

the expiration of thirty days after the judgment was docketed, was right. In the first place, if this execution was issued in violation of a stipulation between the parties to it, it was merely an irregularity of which only the defendant in the execution could take advantage; and besides this branch of defence is not set up in the defendant's answer. I think this judgment should be affirmed.

Gardiner, Johnson, Edmonds and Wells, JJ., concurred.

Ruggles, Ch. J., and *Watson, J.*, did not hear the argument, and *Gridley, J.*, was absent at the decision.

Judgment affirmed.

This decision is supported by the decided weight of authority, though in Massachusetts sale under an execution issued within the prescribed time was held to confer no title. *Penniman v. Cole*, 8 Metc. 496; see also *Briggs v. Wardell*, 10 Mass. 356. An execution issued before a stay of execution is expired is irregular but not void, and its validity cannot be questioned by another execution creditor. *Stewart v. Stocker*, 13 S. & R. (Pa.) 199; compare *Blaine v. Carter*, 4 Cranch, 328, 333. Nor collaterally by the judgment debtor himself. *Freeman on Ex. §§ 25, 26*. Another execution creditor cannot complain that the judgment was not publicly read and signed in open court, as required by statute before the execution issued. *Jones v. Carnahan*, 63 Ind. 229. So of an execution on an award of arbitrators before the time for the appeal expired; *Wilkinson's Appeal*, 65 Pa. St. 189; so of an execution issued against the estate of a deceased person within the prohibited period. *Carson v. Walker*, 16 Mo. 68.

"If the proceedings on the judgment on which process is founded, are merely erroneous and not void, the officer cannot, for that reason, excuse himself for disobeying the precept, and the true reason I conceive to be, that from very wise considerations the court will not thus collaterally and incidentally correct errors. But on the other hand, if it appears that the judgment is void it is otherwise." *Albee v. Ward*, 8 Mass. 86.

ABERCROMBIE'S ADM'R v. CHANDLER.

9 Alabama. 625. (1846)

Sheriffs—Liability for not Executing Writs—Payment as a Defense.

Motion to amerce Chandler, sheriff of Perry county, for not executing a *fiery facias*. The sheriff suggested payment as an excuse, and pleaded not guilty; to the plea Abercrombie joined issue, and to the suggestion he demurred. The demurrer was sustained, but judgment was given for the sheriff on the trial of the issue to a jury. Abercrombie brings error. Reversed.

The Court by Ormond, J. The plea in this case, or replication to the suggestion, as it is called in the record, is clearly bad.

The [*625] duty of the sheriff is to execute all writs placed in his hands, without inquiry into the regularity of the proceedings on which they are founded. Although the process in his hands be voidable, or erroneous, he is nevertheless bound to execute it. He is only excused from doing so, when the process is absolutely void, as was the case in *Holloway v. Johnson*, 7 Ala. 660. *Watson on Sheriffs*, 53; *Watson v. Watson*, 9 Conn. 141; *Parmelee v. Hitchcock*, 12 Wendell (N. Y.) 96.

The facts in this case are, that the sheriff declines to levy, and make the money upon an execution, which is regular upon its face, and authorized by the judgment, and returns upon it, that he has not made the money upon the writ according to its mandate, because the judgment was paid and satisfied by the defendant in execution, to the intestate of the plaintiffs, in his lifetime. These facts constitute no justification whatsoever. If the facts are as he supposes, if the judgment has been discharged by payment, and no formal entry of satisfaction made upon the record, he must nevertheless proceed to execute the writ. No injury can accrue to the defendant in execution from this course. If, in truth, the judgment has been paid off and discharged to the intestate, and his representatives are now seeking to make the money again, out of the defendant, a supersedeas will be granted by the court out of which it issued; and if the judgment has been satisfied, satisfaction will, on motion, be entered, and the execution be quashed.

To permit the sheriff to raise this question, and to refuse to execute a *feri facias*, because the judgment has been satisfied, is wholly unwarranted. His duty is to execute the writ, if the court had jurisdiction to render the judgment, without speculating about consequences, with which he has no concern, and against which, to insure the execution of the writ, the law has clothed him with impunity. This return would open an entirely new mine of litigation, not only unexplored by our ancestors, but unknown to them, of which the least evil would be the endless litigation it would produce. If such a return as this could be tolerated, the execution, instead of being the end of the law, would be merely the beginning of the real litigation. [*626]

Let the judgment be reversed and the cause remanded.

STANLEY v. NUTTER.
16 New Hampshire 22. (1844)

Trover for the value of property levied by defendant as deputy sheriff on an execution on a judgment against the present plaintiff and one Wallace, after defendant herein knew that Wallace had paid the amount of the judgment to the creditor's attorney to prevent a sale of his own property, and had the defendant herein ordered to levy on this property to enforce contribution. Verdict and judgment for plaintiff. Defendant brings error. Affirmed.

The Court by Woods, J. * * * The amount of the execution was paid, and the execution thereby extinguished, and discharged, and rendered void, prior to the levy upon the property. Was the officer liable for the sale of the property by virtue of it, or was he protected by it? The principle well recognized in the decisions is, that when the process is void, and the officer is informed of it by the process itself, it will not protect him in its execution or service; so, also, when it is void from want of jurisdiction over the cause in the tribunal issuing it. In principle or in reason, can it make any difference that he is informed and receives the notice that the process is void? We think not; and, accordingly, that an execution discharged by payment known to an officer, cannot protect him against liabilities for acts done in virtue or under color of it, whether that knowledge be disclosed by the process itself, or otherwise acquired. There must be judgment on the verdict.

WILLS v. CHANDLER.

1 McCrary (United States Circuit Court) 276, 2 Fed. Rep. 273. (1880)

Sheriff's Deed, Validity, Sale on Execution after Satisfaction of Judgment—Power of Judgment Creditor to Discharge Land from Judgment Lien without Payment of Officer's Fees—Who May Have Execution Issued.

Bill in equity by Wills against Chandler and Paxton to quiet title to certain lands in Omaha. Decree for plaintiff.

Nuckolls, a judgment debtor, sold land subject to the judgment, and the purchaser, Kellogg, thereupon paid the amount

of the judgment to the judgment creditor's attorney, Meredith, who thereupon gave him a receipt in full for the amount of the judgment, interest and costs, each understanding that the other was to pay the fees of the clerk of the court. The fees being paid by neither, the clerk, Chandler, who was now out of office, procured an execution on the judgment from his successor, and had the land sold thereon by the sheriff, and Chandler purchased it at the sale. Wills claims by purchase from Kellogg, and Paxton through Chandler and the deed executed to him by the sheriff.

Kennedy & Gilbert, for plaintiff.

G. W. Ambrose and *J. M. Woolworth*, for defendants.

McCrary, Circuit Judge. * * * The validity of the sheriff's sale, under which defendants claim, is attacked first upon the ground that the judgment was satisfied by the plaintiff therein, and that, therefore, the sale was void. The proof clearly shows that the attorney for the plaintiff executed to Kellogg a receipt in full for the judgment, interest and costs. This receipt may be explained by parol proof, and on explanation it is shown that the costs due Chandler, though receipted for, were not in fact paid. It remains, however, clear from the evidence that Meredith and Kellogg both intended that the receipt should satisfy the judgment and remove the encumbrance, notwithstanding the non-payment of Chandler's costs. Had they the power to accomplish this? I think it clear, under the authorities, that in the absence of statutory regulation only the plaintiff in a judgment, or his attorney or agent, has the power either to satisfy it, or direct its enforcement by execution. In this case Chandler (the clerk) was not the plaintiff, nor was he a party to the judgment. There was, in fact, no judgment for any particular sum as costs.

Johnson v. Anderson, 4 Wend. 474, is in point. That was, like the present, a case where the judgment had been paid except certain costs, and the sheriffs to whom the costs were due undertook to sell property on execution for the purpose of collecting them. The court said: "It is not denied that the judgment was satisfied before the sale (except as to the sheriff's fees on the execution) by a settlement between the parties. * * * * *

The sheriff had no right to sell for the purpose of collecting his

fees after due notice of the settlement and discharge of the judgment. The sheriff has no interest in the judgment which will authorize him to interfere with or control any settlement or agreement which the parties may think proper to make. His fees are no part of the judgment. They are but an incident to it, and if the judgment itself is satisfied or discharged he must look to the plaintiff and his attorney for his fees. He cannot collect them from defendant by a sale of his property." And it was held that the purchaser at the sale in that case took nothing. To the same effect see *Lewis v. Phillips*, 17 Ind. 108, and *Hampton Ex parte*, 2 Gr. (Iowa), 137.

In the absence of statutory regulation the clerk has no authority to issue execution without the direction of the plaintiff or his attorney. Herman on Executions, 66. This must be upon the ground that the clerk is not a party to the judgment, and has no control over it.

It is said in answer to these suggestions that Chandler obtained authority from the attorney of the judgment plaintiff to issue the execution. If this be so, it does not help the defence, because that attorney had previously given Kellogg a satisfaction in full of the judgment, upon which satisfaction the latter was relying for the security of his title. To say that the attorney for the judgment plaintiff could execute a valid release to Kellogg, and then, without notice to him, cancel it, and authorize Chandler to issue execution and sell Kellogg's land, would be to sanction a gross fraud.

In selling property under an execution a sheriff acts by virtue of a power, and if the power does not exist no title passes. *Carpenter v. Stillwell*, 11 N. Y. (1 Kernan), 61; *Laval v. Rowley*, 17 Ind. 36.

My conclusion is that at the time of the settlement between Kellogg and Meredith the latter, as agent for the plaintiff in the judgment, intended to and did cancel and satisfy the judgment, and remove the lien from the land in question. The judgment being satisfied, the sale was void and no title passed. * * *

Decree for plaintiff in accordance with the prayer of the bill.

PARSONS v. GILL.

1 L. Raymond 695, 1 Comyns 117. (King's bench, 3 Will. 3, A. D. 1701.)

Mr. Broderick made a motion to refer the regularity of an execution to be examined by the master, &c., alleging it to be irregular for this, that the writ of execution bore teste of the first day of Hilary term, returnable the Easter term following, and the judgment was of Hilary term; so that the writ of execution might have been sued perhaps before the judgment given. Besides, that the judgment was signed after the death of the defendant, for the defendant died the first of April, and the judgment was signed the second of April, which being before the essoin day of Easter term, related to Hilary term; and therefore altogether irregular. But the motion was denied, because (*Per Curiam*) the practice is always so, and well enough.

PEOPLE v. BRADLEY.

17 Illinois 485. (1856)

Execution—Death of Debtor—Effect—Importance of Time of Death.

The Court by Skinner, J. This was an action of debt against Bradley and others, on the bond of Bradley as sheriff of Cook county. The plaintiff assigned for breach of the conditions of the bond, that Kelly and Blackburn, on the 30th day of October, 1854, in the Cook county court of common pleas, recovered a judgment against one Harper, upon which judgment, execution on the same day issued against the goods and chattels of Harper, and which execution was delivered to Bradley, as such sheriff, to execute, on the 31st day of October, 1854; that Harper had goods and chattels within said county, liable to be levied upon and sold in satisfaction thereof, of sufficient value to satisfy the same, and that Bradley refused to levy the execution of said goods and chattels. The plea denies the averment that there were goods and chattels of Harper liable to be levied upon and sold under the execution. The cause was submitted to the court for trial, upon an agreed state of facts, from which it appears, that the execution issued and bore date the 30th day of October, 1854; that Harper, the defendant in execution, died on the evening of the same day; that the execution was delivered to Bradley to

execute on the 31st day of the same month, and that he refused to levy the same of the goods and chattels of which Harper died possessed, on the ground that Harper was dead at the time the execution came to his hands.

If the goods and chattels, of which Harper died possessed, were liable to be levied upon and sold to satisfy an execution against him issued before his death, but which was delivered to Bradley to execute on the day after his death, then the judgment should have been for the plaintiff, otherwise for the defendants. It seems that by the common law the goods of a defendant were bound from the *teste*, that is, the date of the issuing of the execution; and that although the defendant died after the *teste*, and before the writ of execution came to the hands of the sheriff, it might have been levied of the goods of the defendant at the *teste* of the writ in the hands of third persons, or of the executor or administrator. 4 Comyn's Digest, title "Execution," D. 2; *Audley v. Halsey*, Cro. Car. 149; 1 Rol. 893, 1. 23.

Our statute provides that, "no writ of execution shall bind the property of the goods and chattels of any person against whom such writ shall be issued, until such writ shall be delivered [*487] to the sheriff, or other officer, to be executed." R. S. 300, § 8; *ibid.* § 1.

The common law is, therefore, changed, and neither the judgment nor execution is a lien upon the goods of a defendant, until execution is *delivered* to the officer whose duty it is to execute its commands. In New York the statutory provision in this respect is the same as ours, and it is there held, that executions only bind the goods from the time of delivery of the writ to the sheriff. *Haggerty v. Wilber*, 16 Johns. 287; *Cresson v. Stout*, 17, Id. 116; *Lambert v. Paulding*, 18, Id. 311; *Beals v. Allen*, Id. 363.

When the execution in this case came to the hands of Bradley there was no such person in being as the defendant named therein; there was no existing lien upon the goods by virtue of which they could be seized, and other rights had intervened which could not be affected by a subsequent delivery of the execution to the sheriff. Under our law, the widow had become entitled to certain of the goods and chattels of the deceased, and the bal-

ance was subject to be applied to the payment of his debts generally, according to a statutory rule wholly inconsistent with the existence of any lien or priority in favor of the judgment or of the execution. *Welch v. Wallace*, 8 Ill. (3 Gil.) 490; *Judy v. Kelley*, 11 Ill. 211.

We hold that Bradley could not lawfully have levied the execution, which came to his hands after the death of Harper, upon goods and chattels of which Harper died possessed, and, therefore, in refusing to do so, violated no official duty.

Judgment affirmed.

CLERK v. WITHERS.

1 Salkeld 322, 2 L. Raymond 1072, 6 Mod. 290. 11 Mod. 35.

Execution—Death of Plaintiff after Levy—Removal of Sheriff—Defendant's Right to Return.

Decided in the king's bench, before Holt, C. J., Gould, Powys, and Powell, JJ., at Michaelmas term, 3 Anne, A. D. 1705. This report is according to Salkeld. For arguments in full and opinions seriatim, see 6 and 11 Modern.

An administrator recovered judgment, and sued out a *fiery facias*, and delivered it to the sheriff the first of August; the sheriff seized the defendant's goods, and afterwards the administrator died; the sheriff returned, that he had seized goods to the value, *sed quod remanent in manibus pro defectu emptorum*; and afterwards the said sheriff was removed, and a new sheriff sworn in. And now the defendant sued a *scire facias* against the old sheriff, to have his goods again; and judgment being against him in common bench error was brought here, and objected for the plaintiff in error, that the execution was abated, and no body could perfect it; not the executor of the administrator, because he came in *in auter droit*; and the administrator *de bonis non* could not, for he was paramount; and that this was not within the 17 Car. 2. c. 13, for that only regarded the cases after verdict. But *Per Curiam*. This *scire facias* is not maintainable; and these points were resolved:

1st. That the plaintiff's death did not abate the execution, and that the sheriff, notwithstanding that, might proceed in it; because the sheriff has nothing more to do with the plaintiff, for

the writ commands him to levy and bring the money into court, which the plaintiff's death does no way hinder; [*323] besides, an execution is an entire thing, and cannot be superseded after 'tis begun.

2dly. That the old sheriff has not only authority, but is bound and compellable to proceed in this execution; for the same person that begins an execution shall end it, and a *distringas nuper vicecomitem* lies. Of these there be two sorts; one is to distrain the old sheriff to sell and bring in the money; the other to sell and deliver the money to the new sheriff to bring into court; which plainly shows his authority continues by virtue of the first writ. Vide Rastell Ent. 164; Thes. Brev. 90; 34 H. 6, 36.

3dly. That when the sheriff had seized, he was compellable to return his writ, and made himself liable at all events (acts of God excepted) to answer the value of the goods according to his return; 3 Cro. 390; 1 Cro. 459; and by the seizure the property was divested out of the defendant, and in abeyance.

4thly. They held, that the defendant was discharged; because the plaintiff having made his election, and the defendant's goods being taken, no farther remedy could be had against the defendant, but against the sheriff only. He may be compelled to return his writ: If it be a false return, an action lies; if he returns a seizure and sale, he has the money; if he has seized and not sold, that does not discharge but excuse the sheriff, and therefore the plaintiff may have a *venditioni exponas* to the sheriff, if he continues in office; if out of office, a *distringas nuper vicecomitem*, and then he must sell.

5thly. That since by the 17 Car. 2, c. 13, an administrator *de bonis non* may commence an execution on a judgment obtained by an executor or administrator, it is but reasonable, and within the equity of that act, that an administrator *de bonis non* should be permitted to perfect an execution thus begun; for the right comes to him.

Judgment affirmed.

The third and fourth points were unnecessary to the decision, and were not well resolved, as the student will discover by consulting Green v. Burke, post, 205, 210.

MARINER v. COON.
16 Wisconsin 465. (1863)

**How Late Execution may Issue—At Common Law—Under Statutes—
Execution on Dormant Judgment—Who Object and How.**

Action to recover real estate. Plaintiff claims under a judicial sale on execution on a judgment against the defendant. Plaintiff offered in evidence the execution and return indorsed thereon and the marshal's deed executed pursuant to such sale. Defendant objected to the admission of them on the ground that the execution was not issued within two years after the rendition of the judgment. The circuit court sustained the objection, excluded the evidence, and directed a verdict for the defendant. From the judgment entered thereon plaintiff appeals. Reversed.

E. Mariner, in person.

James Mitchell, for respondents.

The Court by Dixon, C.J. The question presented by this case is, whether an execution issued upon a dormant judgment, without leave of court, is void or only voidable. If void, no sale can be made under it, and the purchaser acquires no title; but if voidable, the sale may be valid, notwithstanding the omission to obtain leave. We are of opinion that such an execution is merely voidable, and therefore that no advantage can be taken of the irregularity, except in a direct proceeding to set it aside.

The rule at common law is well known. If the plaintiff failed to take out execution within a year and a day, extended in many of the states, by statute, to two years from the time the judgment became final, it could not be regularly issued thereafter, without reviving the judgment by *scire facias*. The rule was founded upon a presumption that the judgment had been satisfied, which drove the plaintiff to a new proceeding to show that it had not; and yet it was invariably held, that an execution taken out after that time, and without *scire facias* or judgment of revivor, was not null, but simply irregular. The defendant might, if he desired, interpose and set it aside upon motion; but if he neglected to do so, it was considered an implied admission that the judgment

was still in full force. He might waive the irregularity, and thus avoid the expense of a *scire facias*. See *Erwin's Lessee v. Dundas*, 4 How. 79; and *Doe v. Harter*, 2 Carter (Ind.), 252, and the cases cited.

But the code (§§ 192 and 193 of the original act, now §§ 1 and 2 of ch. 134, R. S.) prescribes a different practice, and it is upon this that the counsel for the defendants chiefly relies. When the execution in controversy [*469] was issued, the period was fixed at two years from the entry of judgment. It is now enlarged to five. Laws of 1861, ch. 140. After that period has elapsed, it is provided that "an execution can be issued only by the leave of the court, upon motion," etc. This language is said to take away all power, except it be acquired in the manner prescribed, and to render every process issued in contravention of it void for want of jurisdiction. Were we to suppose the legislature to be speaking with reference to the question of power, then there is nothing in their language inconsistent with the position of counsel and we might adopt his views. But we are not at liberty to act upon this supposition. Upon looking to the previous state of the law, and to other provisions of the act, we see very clearly that it was a matter of practice with which the legislature were dealing, a question as to the *form* of proceeding which should thenceforth be pursued, and not one which necessarily affected the jurisdiction in case the new practice was not complied with. By § 331 of the original act (§ 1, ch. 160, R. S.), the writ of *scire facias* is virtually abolished. The remedies heretofore obtainable in that form may be obtained by civil action under the provisions of the code. But by the particular provision of § 2, ch. 134, above referred to, the remedy by motion to revive a judgment which has become dormant by lapse of time, is substituted. Hence the peculiar significance of the word "only," upon which the counsel insists so strongly to show a want of jurisdiction. The execution shall be issued *only* upon motion; otherwise the plaintiff might resort to the remedy by civil action. It appears, therefore, that the consequences of a departure from the practice prescribed by statute are the same as they were at common law. It is a simple irregularity,

which the execution debtor may waive, and which it seems he did do in this case.

Judgment reversed, and a new trial awarded.

Upon the questions involved in this case the courts are agreed. See review of decisions in Freeman on Executions §§ 29, 30.

4. THE EFFECT OF THE USE OF ONE WRIT ON THE RIGHT TO ANOTHER.

As the erroneous *dicta* in *Clerk v. Withers*, ante, 191, are discussed under this head, the student should read the case in connection with the comments on it in *Green v. Burke*, post, 205.

MILLER v. PARNELL.

2 Marshall 78, 6 Taunton 370, 1 Eng. Com. Law 658. (1815)

Fieri Facias and Capias—Concurrent—Use of Both—Election, When.

This decision was rendered in the English court of common pleas, the judges at the time being Gibbs, C.J., Heath, Chambre and Dallas, JJ.

Rule *nisi* to discharge Parnell out of custody, he having been taken on *ca. sa.* after plaintiff had sued out and levied *fi. fa.* Rule made absolute.

Per curiam. No doubt, a plaintiff having sued out a writ of *fieri facias*, may, if he pleases, omit to execute the *fieri facias*, and take out a writ of *capias ad satisfaciendum*, and execute that before the *fieri facias* is returned or returnable. But there is, also, no doubt that if the plaintiff does execute his *fieri facias*, he cannot have a writ of *capias ad satisfaciendum* till the *fieri facias* is completely executed and returned. This is a middle case. So far as the defendant is concerned, the goods, to the extent of their value, have been levied; and the question is, whether the plaintiff, after taking them, may change his mind, and sue out a writ of *capias ad satisfaciendum* without returning his former writ. If [*372] this might be, it would confer a power that might be much abused. If the *fieri facias* be returned, there is something to bind the plaintiff, and to limit for how much he shall have the body, by showing how much he has already gotten. If a plaintiff might

take goods under a *feri facias*, and hold them a month, or the greater part of the long vacation, and then change his mind, and say, "I will not sell, but will take the body of the defendant under a *capias ad satisfaciendum*," it might be the engine of very great oppression. The plaintiff may, by the practice of the court, sue out both these processes together, if he will, and may use either the one or the other, as he sees advisable, but by using the *feri facias*, first, he makes his election, and having so elected, he cannot use the other process, till after the return of the first. We, therefore, think, that this writ of *capias ad satisfaciendum*, being sued out after the *feri facias* had issued and after the sheriff had taken the goods under it, and before its return, cannot be supported. *Rule absolute, but on the terms of bringing no action against the sheriff.*

Very similar facts and ruling in *Cutler v. Colver*, 3 Cowen (N. Y.) 30.

PRIMROSE v. GIBSON.

2 Dowling & Ryland 193, 16 Eng. Com. Law 78. (1822)

Fieri Facias and Capias—Concurrent—Use of Both—Election, When.

This decision was rendered by the English court of king's bench, the judges being Abbott, C.J., Bayley, Holroyd and Best, JJ.

The question in this case was, whether a *ca. sa.* against the person, and a *fi. fa.* against the goods of the defendant, might both issue at the same time. It appeared that the sheriff's officer, having both writs delivered to him, went to the defendant's house for the purpose of taking him in execution on the *ca. sa.*, and, not being able to find him, took his goods in execution under the *fi. fa.*; and on showing cause against a rule for setting aside the execution for this alleged irregularity,

The Court said, there was nothing irregular in the proceedings, both writs might run together, and therefore discharged the rule, with costs.

PONTIUS v. NESBIT.

40 Pennsylvania St. 309. (1861)

Concurrent Garnishments under Different Statutes.

Rule obtained by Mary Hayes, as garnishee in above action, to show cause why the attachment execution against her should not be quashed. From an order making the rule absolute plaintiff brings error. Reversed.

Plaintiff had issued attachment-execution under Act of 1836, § 35, and served it on the Lewisburg Bank, but finding defendant had no deposits there, had issued this attachment under § 32 of the same act, with a view of attaching stock of said bank, owned by defendant, but held in the name of Mary Hayes, with which writ she was served.

The Court by Woodward, J. * * * The court, on motion, set aside the latter writ, on the ground that the former one had not been abandoned or discontinued, and that plaintiff was not entitled to two attachments at the same time. * * * [*311] * * * The only objection to it was the pendency of the prior attachment. That was no valid objection. Both writs of attachment were execution process; and the general rule is that you may have as many forms of execution as the law will afford, and may pursue them all at the same time until satisfaction be obtained on one of them. Before imprisonment for debt was abolished, a *ca. sa.*, a *fi. fa.*, and an attachment-execution might all be out at one and the same time. We see no irregularity in the practice in this case, but if there were any, it was obviated by the discontinuance of the first attachment, on the same day the court set aside the second.

The judgment is reversed, and the record remanded, with a procedendo.

SPRING v. AYER.

23 Vermont 516. (1851)

Execution against Garnishee after Execution against Principal Defendant.

Trustee process by Spring against Ayer, principal debtor, and against Smith as his trustee. Having obtained judgment against Ayer, plaintiff had execution issued against him, and thereon seized and sold property the proceeds of which partly satisfied the judgment. Smith, against whom judgment had not yet been rendered, claimed this was a discontinuance of the proceedings against him. From judgment against the trustee he appeals. **Affirmed.**

The Court by Redfield, J. * * * If the plaintiff has obtained valid, legal satisfaction of any portion of his debt, and that appears in the case, he could not regularly obtain execution here, against

the trustee, for anything more than the balance. * * * [*518] The party, under the existing statutes, is entitled to attach the goods, effects and credits in the hands of trustees, and also in the defendant's possession; and he must of course have execution against both, at some time; and why these executions against different persons should necessarily be contemporaneous, I do not well see. * * * We perceive no incongruity here in the creditor having his execution against the principal defendant, as soon as his judgment is perfected, if he will move the court to that effect. Perhaps as matter of course he ought not to be required to proceed, at the peril of losing his lien, until the entire suit is ended. But if, in the present case, the issuing of the execution is to be regarded as premature, it could only become, in consequence, irregular and void [voidable], to be set aside on motion, or process for that purpose, but valid so long as it remains on record and acquiesced in by the other party. * * *

Judgment affirmed.

SUTTON v. HASEY.

58 Wisconsin 556, 17 N. W. 416. (1883)

Garnishment after Levy under Execution.

Garnishment on execution by Sutton, the judgment creditor, against Hasey to charge him as garnishee of Chapman, the judgment defendant, for property claimed to be held by Hasey by fraudulent transfer. From judgment charging the garnishee he brings error. Affirmed.

The Court by Taylor, J. * * * It is objected that the plaintiff should not recover in this proceeding, because, after the same was properly commenced under the provisions of § 2753, R. S. 1878 a second execution was issued on the judgment against Chapman, and property levied upon sufficient to satisfy the execution. We do not think this objection is well taken. The judgment against Chapman had not been paid, and the property levied upon had been replevied by the appellant. It is true, appellant had given a bond to answer for the value of the property in case it should be determined that the sheriff was entitled to hold the property seized on his execution to satisfy Chapman's debt. If, however, Hasey should be compelled to pay the amount of the Chapman judgment

in this proceeding, and on the trial of the replevin action the sheriff should succeed, he could only recover damages against Hasey for the amount unpaid on the judgment, and if it were all paid, he would either be defeated in that action or recover only nominal damages.

There does not seem to be any objection to the plaintiff's pursuing both these remedies at the same time. If the proof showed a seizure of sufficient property upon the execution to satisfy the judgment against Chapman,—and there was no dispute as to the ownership of the property so seized, or its liability to be applied in payment of the judgment,—there would be reason for holding that no judgment should be [*565] rendered against the defendant in the garnishee proceedings until it was ascertained whether such levy would discharge the judgment. In such case the proper course would be to get a stay of proceedings in the garnishee action until the result of the proceedings upon the execution was ascertained. * * *

The judgment of the circuit court is affirmed.

ADAMS v. SMALLWOOD.

8 Jones Law (North Carolina) 258. (1860)

Several Simultaneous Fieri Facias to Different Counties—Right or Privilege—Of Course or on Motion—Safeguards, Duty of Court.

Motion by Adams to set aside his execution to Guilford Co. on his judgment against Smallwood and Hiatt on the ground that the judgment had been satisfied by a sale of Smallwood's property on an execution issued to Halifax Co. at the same time that the other writ issued. The motion was opposed by Smith, to whom Hiatt's house in Guilford had been sold on the execution to that county. From an order granting the motion Smith was allowed by the court to appeal. Affirmed.

The Court by Manly, J. It is believed to be within the power of a plaintiff, who has judgment, to sue out a writ of *fieri facias*, and before return day, nothing being done, to return it into the office and sue out another, but it is not within his power to take two writs at the same time, without special leave from the court. It was, therefore, irregular and without any warrant of law, that

the two writs of *fiery facias* were sued out in this case. All that is decided, as we conceive, in the case of *McNair v. Ragland*, 2 Dev. Eq. 42, is in conformity with the above.

It was competent, therefore, for the court, upon its own motion, to have quashed at least one of the writs. It was especially proper for it to do so, after one was satisfied. The judgment thereby became extinct, and the *fiery facias* was consequently deprived of all legal vitality.

It might, occasionally, conduce to the ends of justice to be allowed to take out more than one execution at a time; and, upon proper suggestions as to its expediency, and satisfactory assurances that it would not be urged for the purposes of oppression or fraud, the court would allow it. The writs in such case would be put into action upon the responsibility of the party suing them out, but this responsibility would not dispense the court from the duty of seeing that the objects were apparently legitimate and from guarding, as far as possible, against a misuse of the process. It is a power, in other words, which the court ought to put into the hands of plaintiffs sparingly and with caution.

Judgment affirmed.

Two *fi. fas.* being similarly issued against defendants similarly situated, one only was levied and an injunction against it was dissolved on appeal, the court by Martin, J., saying: "This mode of proceeding was certainly more expeditious than correct. Nothing in our jurisprudence authorizes two executions issuing at the same time on one judgment, whatever be the number of persons against whom it may have been obtained. * * * If one of the executions issued after the first the irregularity is in the second only, and nothing ought to prevent the execution of the first. If they be issued simultaneously, and one of them, alone, as in the present case, be acted upon, the execution of the second, if attempted, may be enjoined. But neither justice nor equity forbid proceedings on the other." *Hudson v. Dangerfield*, 2 La., 63, 20 Am. Dec. 297.

In *McNair v. Ragland* permission was granted on motion to sue out several *fi. fas.* to different counties at the same time.

BRICE v. CARR.
13 Iowa 599. (1862)

Garnishment—Effect as Payment on Main Judgment—Who Bear Loss from Insolvency of Garnishee—Duty of Judgment Debtor.

The Court by Wright, J. Complainant seeks to restrain the collection of a judgment. The gravamen of the bill is, that the creditor garnished a [*600] debtor of the defendant in execution, and held him so long under and by virtue of that process, that he, in the meantime, proved to be insolvent; that complainant thereby lost his debt, whereby he was in equity discharged from all liability on said judgment.

We think the court was justified in concluding that there was no such delay, on the part of plaintiff in the garnishee proceedings, as to entitle complainant to the relief asked. And if unnecessary delay did occur, complainant could have prevented this by paying his debt, as was his duty, and thus releasing the garnishee. This proceeding did not absolve complainant from his duty to discharge his debt. He had something to do. He could not remain passive.

Affirmed.

To same effect see *Dickinson v. Clement*, 87 Va. 41, 12 S. E. 105; *McBride v. Farmers' Bank*, 28 Barb. (N. Y.) 476; *Starr v. Moore*, 3 McLean, 354, Fed. Cas. No. 13,315; *McElwee v. Jeffreys*, 7 S. Car. 228; *Wade v. Watt*, 41-Miss. 248.

Without mentioning *Brice v. Carr*, or any of the cases above cited, the supreme court of Iowa, in a recent case, entered satisfaction of the principal judgment, on petition of the judgment debtor showing that on garnishments judgments had been rendered against the garnishees equal in amount to the main judgment, saying that if the creditor could not realize on the garnishment judgments he must prove it. *Bowen v. Port Huron E. & T. Co.*, 109, Iowa 255, 80 N. W. 345, 47 L. R. A. 131, 77 Am. St. Rep. 539. And see: *Coe v. Hinkley*, 109 Mich. 608; *Doughty v. Meek*, 105 Iowa 16.

In overruling a demurrer to a declaration in debt on judgment because it appeared thereby that a judgment had been recovered thereon against garnishees, the court said: "The judgment against Higgins (defendant) is separate from, and independent of, that against the garnishees. It is true, both judgments are for the same demand, and if either is satisfied the plaintiff would not be permitted to enforce the collection of the other. But until one is satisfied, the plaintiff's remedy on each is as ample as though no other judgment had been rendered." *Price v. Higgins*, 11 Ky. (1 Litt.) 273.

YAZOO & MISSISSIPPI VALLEY RY. CO. v. FULTON.

71 Mississippi 385, 14 South. 271. (1893)

Effect of Garnishment on Title to Property or Debt—Effect on Defendant's Title of Judgment Against Garnishee—Effect of Each on His Right to Action, Judgment and Execution—How Garnishment Should Be Pleaded as a Defense.

Two actions by J. W. Fulton against Yazoo & M. V. R. R. Co. for damages for a mule injured and an ox killed by defendant's trains. Pleas by defendant that it had been summoned as garnishee in a suit against the plaintiff in Tennessee before these suits were commenced and that judgment had been rendered against it. Plaintiff's actions coming to the circuit court by defendant's appeal from the justice's judgment, the circuit court consolidated the actions and gave judgment for plaintiff and defendant again appeals. Reversed.

Mayes & Harris, for appellant.

F. A. Montgomery, Jr., for appellee.

The Court by Cooper, J. * * * The defendant introduced in evidence the record of the attachment suit, and is entitled to have it considered in any light in which it should have been available to it.

There is a wide diversity of views entertained by the courts of the various states as to the effect of a judgment against a garnishee who is afterwards sued by the original creditor, the defendant in attachment or judgment. In England it is held that a judgment against the garnishee is a bar to an action upon the same debt. *McDaniel v. Hughes*, 3 East, 367. The courts of Florida, Indiana, Kentucky, Maine, and Massachusetts have announced the same rule. *Sessions v. Stevens*, 1 Florida, 233; *Covert v. Nelson*, 8 Blackford (Ind.) 265; *King v. Vance*, 46 Ind. 246; *Coburn v. Currens*, 64 Ky. (1 Bush) 242; *McAllister v. Brooks*, 22 Maine, 80; *Norris v. Hall*, 18 Id. 332; *Perkins v. Parker*, 1 Mass. 117; *Hull v. Blake*, 13 Id. 152.

In other states and in the supreme court of the United States, it is held that the judgment or pendency of garnishment proceedings may be pleaded in abatement of the plaintiff's suit. *Embree v. Hanna*, 5 Johns. 101; *Haselton, v. Monroe*, 18 N. H. 598; *Ladd*

v. Jacobs, 64 Maine, 347; *Irvine v. Lumbermen's Bank*, 2 Watts & Serg. (Pa.) 190; *Near v. Mitchell*, 23 Mich. 382; *Clise v. Freeborne*, 27 Iowa, 280; *Brown v. Somerville*, 8 Md., 444; *Mattingly v. Boyd*, 20 How. (U. S.) 128. [*390]

In others, it has been held that, though the proceeding or judgment may not be pleaded in abatement or bar of the suit of the creditor, yet the court, in entering up judgment, would so frame the same as to protect the defendant, garnishee, in the other action from being called on to pay the same debt twice. *Meriam v. Rundlett*, 13 Pick. 511; *Crawford v. Slade*, 9 Ala. 887; *Smith v. Blatchford*, 2 Ind. 184; *McFadden v. O'Donnell*, 18 Cal. 160; *Pierson v. McCahill*, 21 Id. 122; *Shealy v. Toole*, 56 Ga. 210; *Hicks v. Gleason*, 20 Vt. 139.

The course of decision in some of the states has not, probably, been at all times consistent, and we have not attempted to discover how the respective courts now hold, for that is immaterial. The different views entertained, and the general classification of the decisions, have been deduced from a review of the text of Drake on Attachments, ch. 38, and the cases therein cited. The question has never been decided in this state, though in *Kellogg v. Freeman*, 50 Miss. 127, there is a dictum to the effect that by a judgment against the garnishee the debt he theretofore owed to the defendant "is transferred by operation of law," and inures to the benefit of the plaintiff in attachment. We cannot assent to the correctness of this proposition. The plaintiff in attachment, seeking merely to enforce a pecuniary demand against his debtor, does not, by the judgment against the debtor, acquire the legal title to his estate, real or personal. The judgment is but a step in the enforcement of the demand of the plaintiff, and subjects the estate of the debtor to the process of the court to pay the debt awarded. So also the garnishment of one owing the defendant a sum of money or having his effects in possession, and the judgment against the garnishee directing him to pay over the money or deliver the property to the proper officers, are but other steps in the same direction. No property in the debt due or the thing surrendered by the garnishee passes to the plaintiff by the judgment, for, if such were the case, it would discharge, *pro tanto*, the

judgment, [*391] which would thus be self-executing and self-ending. In truth, all that the plaintiff secures is the right to have the garnishee pay to him the debt which, before that, was due to the defendant. Payment by the garnishee is the only thing which can release him and bar the right of his creditor. The mere fact, therefore, that a judgment has been rendered against the garnishee is not available to him in bar of a suit afterwards or before instituted against him by his creditor.

But since the attaching creditor, by his judgment, has secured the right to issue execution against the garnishee, it would be inequitable to permit the defendant in attachment to secure another judgment, with the right of instant execution to collect the same debt. The debt is yet his, and he is interested in its collection, but it has been impounded under legal process, and a charge imposed which is superior in right to his. To meet the exigency and preserve as far as practicable all the rights of all the parties, a number of the courts, as will be seen by reference to the citations above made, have held that the right of action or the right of execution should be suspended until the lien of the attaching creditor is discharged. In those jurisdictions in which it is held that the right of action is suspended, the defendant may plead in abatement of the suit the pendency of the garnishment proceedings or the fact that judgment has been rendered against him therein. In those in which the right to sue is upheld, protection is afforded the defendant by suspending execution of the judgment until the defendant is relieved of liability under the judgment against him as garnishee. In most instances, the practical effect would be the same under either rule.

In view of the facts that it may sometimes be of importance to the creditor to have a judicial determination of his rights at as early a time as possible, and that the debtor cannot be injured by the mere rendition of the second judgment, we think the better rule is that the creditor may proceed to judgment, but that execution thereof should be stayed to an [*392] amount equal to that for which the defendant is sought to be charged as garnishee in a pending suit, or for which judgment has been rendered against him.

The judgment of the court in this cause should have been for the plaintiff, but with a stay of execution as to eighty dollars, with interest from September 9, 1893—the date of the judgment against the garnishee—until the defendant should be discharged from liability thereunder. In failing to incorporate this saying in the judgment, the court below committed error, for which its judgment must be

Reversed, but a proper judgment may be entered here.

MOUNTNEY v. ANDREWS.

Croke's Eliz. 237. (In the queen's bench, Trinity, 33 Eliz., A. D. 1591).

Scire facias upon a judgment in debt. The defendant pleads, that upon a *fieri facias* directed to the sheriff of the county of Leicester, for levying the debt, he by force of it took divers sheep of the defendant's for the debt, and yet detaineth them. And this was ruled a good plea; although he doth not allege that the writ is returned, and although the writ is conditional, *ita quod habias denarios*, &c., for the plaintiff hath his remedy against the sheriff, and the execution is lawful, which the defendant cannot resist. *Rook v. Wilmot*, Cro. Eliz. 209.

GREEN v. BURKE.

23 Wend. (New York) 490. (1840)

Execution—What constitutes a Levy, the General Test—Necessity of Taking and Retaining Exclusive Actual Possession—Importance of Proclamation, View, Handling, Inventory, and Indorsement—Validity of Levy by Infant Officer—Effect of Levy and Release, Escape, Recaption, Compromise, Loss or Destruction of Property—Validity of Sale on New Writ—Sale at a Sacrifice—Rights of Creditor as to Other Property and Writs While Levy Stands.

Replevin by Green against Burke for nine acres of wheat purchased by Green on execution in favor of himself and another against Burke. From judgment on verdict for defendant plaintiff appeals. Reversed.

Defendant claimed that plaintiff acquired no title by virtue of the purchase at the sale by constable Rood, because the judgment was satisfied by reason of a levy on three colts under a pre-

vious execution thereon, which had been returned and the levy abandoned by the constable Stevenson because he was under age.

W. Porter, jr., for plaintiff.

F. G. Jewett, for defendant.

The Court by Cowen, J. * * * There is no dispute that the title to the wheat had been acquired by the plaintiff, in virtue of his purchase under the execution held by *Rood*, unless the previous levy on, and abandonment of the colts by *Stevenson*, worked a satisfaction of the judgment. The latter held a regular execution; and made a levy which was sufficient in point of form, on property of adequate value. It is supposed by the plaintiff's counsel that there was no levy, because no act was done which would, but for the protection of the execution, have been such a taking of the colts as to amount to a trespass. This was spoken of as the criterion of a levy, in *Beekman v. Lansing*, 3 Wend. 446, 450; and it was there said the court were inclined to consider it an essential criterion. We are not disposed to deny that it is so. The court there also said that the officer must take actual possession where it is in his power; but he need not remove the goods. They may be left with the defendant; nor did the court insist that an inventory was necessary. The case cited was well considered; and on the question of what acts of the officer alone shall constitute a levy, highly authoritative. * * * The acts of the sheriff were all summed up in his going to the house of the judgment [*493] debtor with the execution in his pocket, but omitting even to apprise him that he had come to make a levy. The court says that he should have done some definite act in respect to the goods; something which could be known to the debtor and communicated to his landlords. That the latter, at least, were not to be affected by a mere mental levy. *Id.* 451. This question is well considered by Taylor, C.J., in *Doe, ex. dem. Barden, v. M'Kinnie*, 4 Hawks (N. Car.), 279, 280. In short, as between the sheriff and third persons, he shall not be allowed to proceed in so secret a manner, as to cut off all probable means of their knowing how to deal with the debtor in respect to his goods, whether as purchasers from him, or as his landlords claiming rent, or as subsequently levying creditors. *Vid. Bliss v. Ball*, 9 Johns. (N. Y.) 132.

Haggerty v. Wilber, 16 Id. 287. As it respects the defendant himself, too, the proceeding should be such as to apprise him of the step; and if he be not informed of it, at least a reasonable time before the sale, yet the sheriff's acts should be such as not to leave the inference of intentional concealment. The defendant should have a fair opportunity to make the proper arrangements for preventing a sacrifice of his property. The proceedings of the officer being such as are naturally calculated to avoid injurious consequences, the form in which he chooses to make the levy is totally immaterial. Holding the process, having the goods in his power, and directly declaring his intent, or doing what is equivalent, as taking an inventory, or making a memorandum of the levy, satisfy that branch of the rule which directs a change of possession. Speaking is always an important part of the *res gestae* which constitute such a change. In *Wood v. Vanarsdale*, 3 Rawle (Pa.), 401, the sheriff merely entered a store of goods, and declared his intention to levy; and although the defendant expressed his dissatisfaction, and did no act to waive formality, the seizure was held to be complete, notwithstanding the officer returned *nulla bona*. He had put no one in possession, taken no inventory, and never, after declaring the levy, interfered with the goods in the least. The court held distinctly, citing the New York cases, that none of these acts were necessary; and the sheriff [*494] having returned the execution and abandoned the levy, by consent of the plaintiff's assignee, the judgment was declared to have been satisfied. In *Trovillo v. Tilford*, 6 Watts (Pa.), 468, the sheriff did not see the goods at all, nor did he go near them; but the defendant gave him a schedule, by arrangement, which he agreed should be considered a levy; and that was held sufficient, even against a third person, claiming as the defendant's vendee. *Gilkey v. Dickerson*, 3 Hawks (N. Car.), 293, is not incompatible with *Trovillo v. Tilford*, nor with the common notion of what acts constitute a levy. There the coroner merely called on the defendant and asked him for a list of goods which he might sell to satisfy the execution; and the defendant gave him a list of negroes, sufficient in value; but the coroner never saw them, and the defendant afterwards took them out of the county and sold them. The cor-

coroner therefore levied again on two other negroes, which the defendant afterward sold to Gilkey, who insisted on his right as vendee, because the judgment had been satisfied by what he called the first levy. Held that it had not; and Taylor, C. J., gave the reason. He said: "Had the property been present when the list was delivered, and the coroner had signified that he held it bound to answer the execution, and there was no opposition to his possessing himself of it, had he so desired, it would have amounted to a levy." It will be perceived that no evidence was given whether the negroes were anywhere within miles of the coroner; and he did nothing and said nothing indicating that he considered the list a levy. Beside, according to our cases, the eloignment and sale of the negroes by the defendant would have warranted the second levy irrespective of the question whether the first had been regular or not.

An actual taking of possession, therefore, does not necessarily imply an actual touching of the goods; but merely such a course of action as, in effect, is calculated to reduce them to the dominion of the law. They are then considered as in the custody of the law; and a degree of constructive force is imputed which at once entitles the party whose goods are thus seized to his action of trespass, if the officer [*495] be destitute of authority. Whether the rule requiring that to be done which may amount to a trespass, is thus satisfied, we have examined more at large in the case of *Connah v. Hale*, 23 Wend. 462. I have said more upon the point now, because *Bailey v. Adams*, 14 Wend. 201, has been pressed upon us as implying that the property must in some way be manually interfered with. There the constable went with his execution to the man who had possession of the property, a wagon, claimed to levy on it as belonging to the defendant in the execution, making a note of the levy, and leaving the wagon, with directions that the man should take care of it. Ten or twelve days after, becoming satisfied that the execution debtor had no title, he offered to relinquish his claim to the plaintiff, who was the real owner; but the latter refused to accept the wagon, and brought trover against the creditor who had directed the levy. The acts of the constable were held not to have been a conversion; the court remarking that

the actual possession of the property was not changed, and the plaintiff had been put to no charge concerning it. The learned judge who delivered the opinion of the court, referred in a general way to *Reynolds v. Shuler*, 5 Cowen, 323, and *Bristol v. Burt*, 7 Johns. R. 254. The question was considered in those cases; but, with deference, I understand them both to hold that such acts as were proved in *Bailey v. Adams*, would clearly amount to a conversion; and that even an actual acceptance of the goods by the owner, much less a mere offer to deliver them, could no farther qualify the wrong, than by reducing the damages. *Wintringham v. Lafoy*, 7 Cowen, 735, was not cited. That case held the officer liable in trespass *de bonis asportatis*, though he merely claimed to have levied, taking an inventory and receipt. The decision was also incompatible with the rule laid down in *Allen v. Crary*, 10 Wend. 349; *Fonda v. Van Horne*, 15 Id. 631, 633, and many other cases. The injury being complete, it is clear that a tender of the property will not affect the plaintiff's rights. *Clark v. Hallock*, 16 Wend. 607; *Hammer v. Wilsey*, 17 Id. 91. It is said in the latter case, and so are all the authorities, that even an acceptance by the plaintiff, [*496] goes to the question of damages only. There is no such thing as waiving a cause of action after it has once arisen. And in the case at bar, there is no question that either trespass or trover would have lain by Burke against Stevenson, the minor, notwithstanding his abandonment of the levy, unless he was protected by the process. * * * In short, there was no such thing as Stevenson purging his own wrong by merely omitting to follow up the trespass he had committed. He went to the field with the defendant, for the purpose of levying on the colts; and made a note of the levy on the back of the execution. He not only had the goods in view, and the intention to levy, but the defendant, the execution debtor, had notice, and co-operated in, and submitted to the act.

Prima facie, then, the debt was, or might have been, according to the event, satisfied by the levy. And many cases are cited by the defendant's counsel to show that, although the constable gave it up, and returned the execution to the justice, utterly refusing to proceed, yet the plaintiffs were concluded and could not sue

out a new execution. The ground taken is, that the judgment was unqualifiedly satisfied by the levy. Admitting that the constable had the power to levy, then, so long as he kept the act good, and followed it up, something near the consequence contended [*497] for undoubtedly followed; but he withdrew, without the consent or knowledge of the plaintiffs, and I am not prepared to admit that, in such a case, the creditor is bound to look to the officer alone for his remedy. I know that learned judges use language in the cases cited, which is very strong. They say a levy is a satisfaction of the debt; but every book they cite, and every case they decide, shows under what qualifications they speak. They all go back to *Mountney v. Andrews*, Cro. Eliz. 237. There the plaintiff brought a *scire facias quare executionem non*, and the plea was, not simply that the sheriff had levied, but that he *had taken divers sheep* of the defendant for the debt, *and yet detaineth them*. The reason given was, that "the plaintiff has his remedy against the sheriff, and the execution is lawful which the defendant cannot resist." The value of the sheep was not mentioned; and surely it cannot be pretended that such a step shall be taken as a satisfaction *per se*. Suppose the sheep had been sold, bringing only half the judgment; was the remedy by action, *scire facias*, or execution gone for the residue? I need not cite authorities to show that such a consequence would not follow. It would be absurd, and contrary to all practice. The doctrine laid down in *Clerk v. Withers*, 1 Salk. 322, the case commonly relied on, is, that "the defendant's goods being taken, no farther remedy could be had against the defendant, but *against the sheriff only*." The reason given is: "He may be compelled to return his writ; if it be a false return, an action lies; if he returns a seizure and sale, he has the money; if he has seized and not sold, that does not discharge, but excuse the sheriff, and therefore, the plaintiff may have a *venditioni exponas*," &c. The doctrine thus laid down was not material, at least not essential to the decision; and on referring to the same case in 2 Ld. Raym. 1072, a contemporary report, the whole will be found to lie in a dictum of Gould, J., founded on a curtailed statement of *Mountney v. Andrews*. In this he does not present the plea there as one of *detainer*, but of *levy only*. It is

impossible to say that a verdict for the defendant would have operated as more than a temporary bar of execution. The [*498] seizure works no change of interest beyond vesting a special property in the officer. The general property still remains in the debtor. *Wilbraham v. Snow*, 2 Keble, 588, 1 Siderfin, 438, s. c. and *vid. Ayer v. Aden*, Yelverton, 44. The goods are but a collateral security; and the seizure is, *per se*, neither a payment nor satisfaction absolute, but only *sub modo*. Yet from *Clerk v. Withers*, comes a progeny of *dicta* couched in the same general language. Parsons, Ch. J., in *Ladd v. Blunt*, 4 Mass. 402, puts it that when sufficient goods are seized the *debtor is discharged*, even if the sheriff waste the goods, &c.; for, by lawful seizure the debtor has lost his property in the goods." None of this was necessary, for he was merely examining whether a levy on *land* would satisfy the debt, and held it would not, and in such case, he concludes it is no satisfaction, because till the land is delivered to the plaintiff, the title of the defendant is not divested, and the judgment is unsatisfied. We have held the same thing. *Shepard v. Rowe*, 14 Wend. 260, 262. And yet we have often taken it for granted that the sheriff may, nay must levy on land as well as goods; *Jackson ex Dem. Sternberg v. Shaffer*, 11 Johns. 513, 517; *Jackson ex dem. Carman v. Rosevelt*, 13 Johns. 97, 102; and we have, in several cases, allowed him fees for such levy, which implies that we consider it an incipient execution of the process, the same as a levy on goods. *Parsons v. Bowdoin*, 17 Wend. 14, 15, and the cases there cited. Are these cases all wrong? If not, a levy on land is more than a levy on goods, for the lien of the judgment conspires with that of the execution. In neither case is the debtor's property absolutely divested till a sale; but in both it is partially displaced, though the sheriff acquire no interest in the land. Take it that the sheriff holds a mere naked power in respect to the land, like a tax collector; *Catlin v. Jackson*, 8 Johns. 520, 546; take it that the power or levy dies with him, or expires when he goes out of office, or is gone with the return day of the *fi. fa.* according to the cases in North Carolina; *Doe, ex dem. Barden v. M'Kinnie*, 4 Hawks (N. Car.), 279; *Frost v. Etheridge*, 1 Dev. (N. Car.), 30; *Den, ex dem. Tayloe v. Fen*, 1 Dev. 295; *Tarkin-*

ton v. Alexander, 2 Dev. & Batt. 87, and the cases cited by *Gaston, J.*; yet you have a lien by virtue of the judgment, surer in its effect than can arise from a mere levy on personal property; and the distinction between the effect of discharging the lien in one or the other case, is merely technical. The goods levied on are a pledge for the debt, like a distress for rent in the hands of the landlord. That too works a suspension of all other remedy; and may mature into a satisfaction. *Vid. Wallis v. Savill*, 2 E. Lutw. (Eng.) folio p. 1532, Eng. Ed. 649; *Hutchins v. Chambers*, 1 Burr. 589; *Bradby on Distresses*, 130. A voluntary relinquishment of a sufficient distress would probably bar all further remedy by the act of the landlord, if not an action for the rent. And yet in almost every other point of view, the goods are regarded as no more than a collateral security.

Our cases appear to have drawn various consequences from *Clerk v. Withers*; but I apprehend none of them admit the levy to operate as an absolute satisfaction. *Reed v. Pruyn*, 7 Johns. R. 426, was where the sheriff had paid the money. The court there cite *Ward v. Hauchet*, 1 Keble, 551, to show that the sheriff taking security for the debt, would discharge it: but in that case the plaintiff consented to the sheriff taking a bond. Nothing is said of a levy, and the rule there, as stated by counsel and agreed to by the court, is clearly not law. Merely taking security by bond will not discharge a judgment, though I admit that security taken in due course of execution, even without the plaintiff's assent, will have the same effect as a levy—for instance, if it be taken by way of a receiptor or by bond in place of the goods seized. *Bank of Orange County v. Wakeman*, 1 Cowen, 46, and note. In *Hoyt v. Hudson*, 12 Johns. 207, the action was against the constable, who had seized the goods and taken a receiptor. It was held that he could not levy again. That was like a sheriff suffering a voluntary escape. He cannot make recaption of his own head. In *Ex parte Lawrence*, 4 Cowen, 417, the levy on personal property still pending was held to take away the lien of the judgment on the debtor's real estate, and so the creditor could not redeem. The court say the levy *extinguished* the judgment, citing the previous cases. In *Jackson, ex dem.* [*500] *Merritt v. Bowen*, 7 Cowen,

13, the same point was decided; the *fi. fa.* having been returned by direction of the creditor, and the levy thus discharged. *Cornell v. Cook*, *id.* 310, 315, is a mere recognition of the general doctrine by Savage, Ch. J. In the case of *Wood v. Torrey*, 6 Wend. 562, the assignee of the judgment himself stood receptor to the sheriff; yet he was allowed to make a second levy as against the defendant, because the latter had caused the eloinment of the goods. * * * An actual payment to the sheriff would probably be deemed a payment of the debt. The judge seems to concede this in *Ontario Bank v. Hallett*, 8 Cowen, 192. That a payment to the sheriff is a good discharge of the immediate defendant was agreed both in *Dyke v. Mercer*, 2 Shower (Eng.) 394, and *Clerk v. Withers*. [So held in *Matter of Dawson*, 110 N. Y. 114, 17 N. E. 668.]

Thus, after all that has been said, we are to this day destitute of any direct adjudication that *levy* alone absolutely extinguishes or satisfies a judgment, as payment of the money would do. The levy on a single sheep, according to the *dicta* in *Salkeld and Raymond*, would satisfy a thousand pounds; and so perhaps of several detached *dicta* since that time. The gross absurdity of such a rule has led the judges, in all the later cases, to speak in more qualified terms; such as that the goods must be of *sufficient value* to satisfy the debt; and again, if the debtor eloin them, the levy is not a satisfaction. Nor do I believe any judge would, at the present day, hold the plea in *Croke* to be more than a temporary [*501] bar of further execution; a mere ground for setting it aside on motion. Would the judgment for the defendant on that plea have barred an action of debt? Might not the plaintiff have replied that the sheep sold for less than the judgment; and so recover the balance? To an action of debt, the plea could have been nothing more in effect than a plea in abatement.

What then, after all, does the rule amount to? Merely this: that the levy is a satisfaction *sub modo*. It may operate as a satisfaction, and must be fairly tried; but if it fail, in whole or in part, without any fault of the plaintiff, he may go to his farther execution. He must fairly exhaust the first; and while that is going on, he can neither sue on the judgment, nor have another

fi. fa., nor a *ca. sa.*, nor can he redeem lands sold on another judgment. The plaintiff may, by tampering with the levy himself, lose his debt—as if he release property from arrest, which is sufficient to pay the debt. Even a distress which answers only part of the rent may generally be followed up by distraining again; and might, I apprehend, by the common law. *Vid. Bradby, and cases before cited in connection with him.* In the still higher remedy by *capias ad satisfaciendum*, if the sheriff allowed the debtor to escape without the previous consent of the plaintiff, the latter might always, even before the declaratory statute of 8 and 9 Wm. 3, sue out a second *ca. sa.*, though the *sheriff* could not retake on the first. *Buxton v. Home*, 1 Show. 174; *Scott v. Peacock*, 1 Salk. 271. And, on an escape against the will of the sheriff, either *he* or the *plaintiff* might retake. *Alanson v. Butler*, Siderfin (Eng.) 330. Thus it will be seen the law has never adopted a harsh and blind rule, which will not yield to diversities and exigencies as they arise. Indeed there are so many ways invented by which goods may be got from the sheriff, sometimes by fraudulent claims, sometimes by prior liens, and even by his own negligence, that it behooves the courts to look into the rule now urged upon us as working by a sort of magic to cut a man off from his debt without the show or pretence of satisfaction. It is severe enough on plaintiffs who are without fault, to require that they should get their executions [*502] returned, without their debts being held satisfied, because in the mean time the sheriff may have relinquished goods levied on. Doing so the debtor has them to himself. In the case at bar, Burke had his colts again. Sometimes goods are so covered up by previous liens that it does no good to sell them, for none will buy. And shall the party, in such case, be driven to an attempt which must be idle? Why may he not have his execution returned and resort to his creditor's bill? Indeed, we have been obliged to hold that he may. *Evans v. Parker*, 20 Wend. 622. Who will say that if the plaintiff happen to commit a mistake, and relinquish a levy upon a *modicum*, he must therefore lose his debt? If he have fairly and in good faith closed his proceeding on execution, why not give him his ulterior remedy?

But was not the levy in question void by reason of Stevenson's non-age? It appears that the town had elected him to the office of constable; and the justice had placed the execution in his hands. The plaintiffs then directed him to go on and collect as soon as might be. He levied; but becoming satisfied that he had already committed a trespass, he was too prudent to go any farther; he returned the process to the justice, and gave up the colts to the defendant. The latter offered to pay him the money, but he would not take it. Now it is said he was an officer *de facto*; and that his acts bound the defendant and the plaintiff. He may indeed have been an officer *de facto* (*People, ex rel. Dobbs v. Dean*, 3 Wend. 438); and had he gone on and collected the money, the defendant never disturbing him, nor the creditors in their possession of it, the thing would have been well enough. But his acts were valid only in respect to such third persons as were affected by them. Viner's Abr. tit. Officer, G. 3, Id. G. 4, vol. 16, p. 113, Lond. ed. 8vo. 1793. I know the cases have gone a great way. But they have stopped with preventing mischief to such as confide in officers who are acting without right. *People, ex rel. Bush, v. Collins*, 7 Johns. R. 549. The officer himself cannot be protected, except in some such case as *Wood v. Peake*, 8 Johns. 69. There he was appointed by the judicial act of magistrates having jurisdiction [*503] in cases of vacancies happening; and it was held that the officer's power could not be impeached collaterally by showing that a vacancy had not happened. * * *

[*504]

The result is plain. Stevenson was a trespasser. And, after the plaintiffs in the execution had been informed that he was an infant, they, by urging him on, would have brought themselves to participate in his peril. Then, taking the rule of satisfaction by levy in all its general strictness, as contended for by the defendant's counsel, what were the constable and plaintiffs to do? Most obviously, they stood within an exception to the rule. Had the money been collected by a sale of the colts, Burke might have recovered their value in trespass or trover; and in this might, most probably, have joined the plaintiffs, if he could show notice to them of their constable's disability. Such a circuitry would clearly

have nullified the credit, and brought down a new execution on the defendant. The upshot is, that this young man prudently chose to do beforehand what the law would have forced him to do in another form; and, however stringent the rule of satisfaction by levy, this case made a plain exception. Suppose the sheriff to make an irregular arrest even on a *ca. sa.*; is the plaintiff to be cut off from his debt because the officer lets the man go? Goods of a third person are levied on and discharged; no one would pretend that this discharges the debt. There can be no doubt that in such and the like cases the creditor may relinquish the arrest, or levy, without prejudice.

It follows that the second execution in the case at bar was regular. The sale of the wheat on the ground, under that execution, was not impeached. Evidence was given of a disproportion in value between the wheat as it turned out and the sum due on the execution. Admit this, and that the plaintiffs directed the constable to sell it in preference to other property; Burke should have paid the debt. The sacrifice, if it be one, seems to have been of his own seeking. He sought to avail himself of a supposed technical advantage, derivable from the levy on the colts.

The verdict should, therefore, be set aside; at least so modified as to find the property of the wheat in the plaintiffs. * * *

New trial granted.

Judge Cowen's masterly argument in this case has been cited with approval by almost every court in America. If it did not establish a new rule, it caused the old one laid down in *Mountney v. Andrews* to be better understood. The supreme court of Arkansas (*Whiting v. Beebe*, 12 Ark. 538), in speaking of this subject said: "The rule laid down in *Clerk v. Withers*, was recognized by most of the American courts for a long while. Thus in New York, Kent, C.J., in *Denton v. Livingston*, as early as 1812 recognized and approved the decision in that case, after which for 27 years, in a series of uniform decisions, it was adhered to, until, in *Green v. Burke*, Cowan, J., for the first time in that state, questioned the propriety of the rule in its unqualified sense, after which *Bronson, C.J.*, in *People v. Hopson*, 1 Denio, 574, distinctly announced a change in the rule, which has since been generally acquiesced in by most, indeed by all the courts of the United States, so far as we are advised." In that case, *Bronson, C.J.*, said, "If the broad ground has not yet been taken, it is time it should be asserted, that a mere levy on sufficient personal property, without more, never amounts to a satisfaction of the judgment. So long as the property remains in

legal custody the remedies of the creditor will be suspended. He cannot have a new execution against the person or property of the debtor, nor maintain an action on the judgment, nor use it for the purpose of becoming a redeeming creditor." For further discussion of the question see *Farmers & Mechanics' Bank v. Kingsley*, 2 Doug. (Mich.) 379; *Kershaw v. Merchants' Bank*, 7 How. (Miss.) 386; *Fry v. Manlove*, 60 Tenn. (1 Baxter) 256; *Reynolds v. Rogers*, 5 Ohio, 174.

Abandonment of Levy. It has been held that a sale under *fi. fa.* was not void by reason of a levy under a prior *fi. fa.* in the same suit on other property, which was released with the creditor's consent, and the writ returned without anything further being done with it. *Wright v. Young*, 6 Ore. 87. But without proof of release of the first levy the purchaser under the second writ was held to have no title, the right of the creditor to abandon the levy and have a second writ, on returning the first, being assumed. *Friyer v. McNaughton*, 110 Mich. 22, 67 N. W. 978.

The supreme court of Pennsylvania refused to set aside a testatum *fi. fa.* issued after return of a *fi. fa.* showing levy and release. The court say: "The hogs were levied on by the sheriff, and were released, for what cause does not, nor is it necessary to appear, by the plaintiff's attorney, with directions, that the writ should not be executed." *Duncan v. Harris*, 17 Serg. & R. 436.

Yet the rule as generally stated is that if the creditor order a release without the consent of the debtor his claim is discharged, and he has no further remedy. Certainly the creditor would not be permitted to harass the debtor by seizing and releasing one thing after another. *Smith v. Hughes*, 24 Ill. 270; *Hunt v. Breeding*, 12 S. & R. (Pa.) 37, 14 Am. Dec. 665.

The right of the creditor to have a new writ upon return of the first, on which a levy has been made and nothing further done, must be conceded, provided the return shows, or it is otherwise proven, that any of the following facts exist:

1. That the first writ or levy was void, as in *Green v. Burke*, or
- 2, that defendant had no leviable interest in the property, either because it was exempt from process or because it belonged to a stranger; for neither the plaintiff nor the officer is bound to persist in a mistaken course, but only have the burden to prove the fact (*Dixon v. White Sewing M. Co.*, 128 Pa. St. 397; *Bliven v. Bleakley*, 23 How. Prac. N. Y. 124), or
- 3, that defendant had rescued the property, or the officer had allowed it to escape or had abandoned it without plaintiff's consent, no loss thereby accruing to defendant (cases cited in *Green v. Burke*; also, *Littlefield v. Ball*, 103 Mich. 17; *Howard v. Bennett*, 72 Ill. 297), or
- 4, that the plaintiff had ordered the release at defendant's request or with his consent (*Walker v. Commonwealth*, 18 Gratt. (Va.) 13, 98 Am. Dec. 631), or
- 5, that other creditors had obtained the property or its proceeds (*Bank of Pennsylvania v. Winger*, 1 Rawle (Pa.) 295, 18 Am. 633, post 499), or, probably,
- 6, that the property had been destroyed by overwhelming calamity (compare *Brice v. Carr*, ante, 201, but see cases cited in above opinion); and probably in many other cases.

5. WHO MAY DEMAND AND CONTROL THE ISSUANCE AND EXECUTION OF THE WRITS.

As to the right of clerks, sheriffs, etc., to use and control execution to obtain satisfaction of their fees, read again *Wills v. Chandler*, ante, 186. As to a defendant enforcing contribution by execution on the original judgment, re-read *Stanley v. Nutter*, ante, 186.

STEELE v. THOMPSON, ADM'R.

62 Alabama 323. (1878)

Liability of Clerk for Refusal to Issue Remedial Process on Demand, Form of Demand—Assignee's Right to Process, Proof of Title, Waiver—Recording Assignment—Parol Assignment—Demand by Attorney not of Record.

Action by Elijah S. Thompson, admr., against Jno. D. Steele and others. From judgment for the plaintiff defendants appeal. Affirmed.

This is an action against Steele and the sureties on his official bond, as clerk of the circuit court for Greene county, for his refusal to issue an alias execution.

Snedecor, Cockrell & Head, for appellants.

W. P. Webb and Enoch Morgan, for appellee.

The Court by Brickell, C. J. * * * The first question is, whether it is the duty of the clerk of a court in which a judgment has been rendered to issue execution thereon, at the verbal request of an attorney of the assignee of the judgment, the assignment not appearing of record in the court, and no written evidence of it being shown him, nor the attorney having entered himself of record, as an attorney for the plaintiff in the judgment. Judgments, as well as choses in action, are assignable. The assignment may not clothe the assignee with the legal title, but if it is unqualified, it passes the entire equitable interest, and is an irrevocable authority to employ the name of the assignor in enforcing it, and collecting and receiving the money due thereon. The court in which the judgment

was rendered will protect the rights of the assignee, and will prevent the assignor from interfering with his control over it. No payment made to the assignor after notice of the assignment is valid, and by no release or admission can he impair the equity of the assignee.—*Holland v. Dale*, Minor (Ala.), 265; *Gayle v. Benson*, 3 Ala. 234; 2 Brick. Dig. 153, § 312; Freeman on Executions, § 21. The assignment may be by writing, or by parol, and either, when founded on a sufficient consideration, passes the same rights, and confers the same authority. No entry of it on the records of the court is essential to its validity and operation, nor is there any statute, or rule of the common law, requiring that such entry shall be made.

An execution in civil actions, is the process by which the debt, or damages, or other things recorded, and the costs adjudged, are obtained. The clerk of the court is charged with the duty of issuing the original, within a certain number of days after the adjournment of the court. If satisfaction is not obtained by the original, the party interested has the right to an *alias*, and a *pluries*, until satisfaction is obtained. These writs it is the duty of the clerk to issue on application; and his failure is a breach of his official bond, which binds him to the performance of all the duties required of him by law. The application may be oral or written. If the clerk deems it necessary for his protection, he may require that it be reduced to writing. But if it is oral, and [*328] he makes no objection on that ground when it is made, he cannot subsequently excuse his failure to comply with it, on the ground that it was not in writing. If he had objected, the cause of objection would have been easily removed; but not then objecting, and tacitly accepting the application as sufficient, it would be gross injustice to suffer him to excuse his failure from which injury has resulted, because of the manner of the application. So, if the application is made by a party having the real interest in the judgment, entitled to control it, though his interest and authority may not appear of record, he may demand some evidence of the interest or authority, if he doubts it. But if he makes no such demand—if by his silence he recognizes the interest and authority, it would approach a fraud, if he was heard subsequently to say in

excuse for his failure to issue the writ, when injury had resulted, that no evidence of the interest or authority was shown him. As assignee of the judgment against Kirksey, the appellee had full authority over it. It was his right to demand execution thereon in the name of the plaintiff, and it was the duty of the clerk to comply with the demand when it was made. There is no particular form required, in which the demand should be communicated to the clerk, and if there had been, the form could have been waived by the clerk, and it was waived when he did not object to the form in which it was made. The assignee may control the judgment through an attorney, or an agent, and the demand or instructions of the attorney or agent, are of the same force as if they had proceeded from him personally.

It is enough to say in reference to the remaining question, there was no evidence the judgment was satisfied before the demand of the issue of execution. On the contrary, the evidence seems to us, undisputable, that it was unpaid, and the just inference is, the clerk knew the fact.

Let the judgment be affirmed.

That an assignee may have execution in the name of judgment creditor, but cannot have execution in his own name, see: *Reid v. Ross*, 15 Ind. 265; *Fiske v. Lamoreaux*, 48 Mo., 523; *Owens v. Clark*, 73 Tex., 547. Intimated that clerk should indorse on the execution, that it is for benefit of assignee, *Reid v. Ross*, supra, but see *Owen v. Clark*, supra. That the purchaser may have execution without first bringing a scire facias, see *Corriell v. Doolittle*, 2 G. Greene, (Iowa) 385.

In Louisiana it has been held that one purchasing a judgment on execution could not have execution on it, but only had a right to sue the judgment debtor. *Fluker v. Turner*, 5 Martin, N. S. (La.) 707.

As a general rule, assignees of demands may make use of any remedy to collect them that would be available to the assignor, including attachment and garnishment. *Fuller v. Smith*, 58 N. C. (5 Jones Eq.) 192; *Crippen v. Fletcher*, 56 Mich., 388, 23 N. W. 56; *White v. Simpson*, 107 Ala., 386, 18 South, 151.

Held that assignee of a claim could not attach on the ground that the obligation was fraudulently contracted, for that is a personal matter between the original parties. *Cheshire Provident Inst. v. Johnston*, Fed. Cas. No. 2659.

STATE on Relation, &c. v. HEROD.

6 Blackford (Indiana) 444. (1843)

Execution—Right to Control—Duty of Sheriff—Liability for Disobedience of Directions.

Case against Herod as sheriff of Bartholomew county, for abandoning a levy under a *fi. fa.*, on a judgment in favor the state on the relation of Dietz, treasurer of said county, against J. Riddick, after said judgment had been assigned to the persons for whose use this action is being prosecuted. The defendant knew of the transfer, but returned the execution unsatisfied upon the order of Riddick, who had then become county treasurer. Judgment for defendant, and plaintiff brings error. Reversed.

The Court by Sullivan, J. * * * We think the court mistook the law of this case. The board of commissioners having transferred the judgment, the county had no further control over it, nor the execution that issued upon it. The control of it belonged to the assignees; and the sheriff, in obeying the directions of Riddick, was guilty of a palpable violation of duty. A sheriff who seizes property by virtue of a *fi. fa.*, and does not sell within a reasonable time, is liable for his non-feasance to the party injured, unless he has an excuse known to the law. It will not certainly be contended, that a neglect to sell at the request of one who has no other interest in the execution than to defeat it, is such an excuse. The judgment is reversed with costs, and the cause remanded.

MORGAN v. PEOPLE.

59 Illinois 58. (1871)

Debt by the People of the State of Illinois for the use of Thomas Lewis against Joel G. Morgan et al. on the official bond of Morgan as sheriff of Alexander county. The defendant pleaded: 1, *non est factum*; 2, that the sale was not ordered suspended; 3, that he sold the property according to law by virtue of an execution against Lewis; 4, that the attorney for the judgment creditor directed him to sell. A demurrer to the third and fourth pleas was sustained, and judgment found for the plaintiff on issue and trial on the other pleas. Defendant brings error. Affirmed.

The Court by Thornton, J. * * * [*61] The declaration avers that the sheriff had an execution in favor of Boyer against Lewis, by virtue of which he levied upon certain shares of stock, and advertised a sale on the 29th of October, 1867; that the defendant in the execution paid off and satisfied the same on the 28th of October, except the costs, and that prior to the sale, the plaintiff in the execution ordered a suspension thereof, and that the sheriff refused to suspend, and sold stock of the value of \$5,000. * * *

An officer might proceed strictly in accordance with the law governing the conduct of an execution in his hands, and yet be guilty of the breach assigned. He may have an execution in due form; levy it upon property liable to seizure; make proper advertisement of a sale, and fully comply with the formal requirements of the law; yet, if he should sell in utter disregard of the instructions of the plaintiff, he incurs a liability to the defendant in the execution. The third plea does not then traverse the material portion of the breach. The fourth is no better than the third plea. The breach is, that the plaintiff suspended the sale; the plea is, that the attorney directed it; but *non constat* that he may not have violated the orders of the plaintiff. The execution is the process of the plaintiff, and he has a right to control it without any interference on the part of attorney or officer. *Reddick v. Administrators of Cloud*, 7 Ill. (2 Gil.) 670. The demurrer was rightly sustained. * * *

Judgment affirmed.

That officers of court, or witnesses to whom fees are due, have not the power to order execution on a judgment owned by another, see *Ex Parte Hampton*, 2 G. Greene, (Iowa) 137.

DAUGHERTY v. MOON.

59 Texas 307. (1883)

Power—Revocability—Execution—Sheriff's Liability for Disobedience of Directions.

Action on a sheriff's official bond for not collecting an execution taken out and delivered to him by the plaintiff on a judgment in favor of one Petrie against one Bohny; Petrie having previously executed to plaintiff a power of attorney, authorizing him to

take out such execution, and agreeing to give him one-third of what he could collect. The petition avers that the defendant levied sufficient property to satisfy the execution, but later disregarded plaintiff's directions and returned the execution, because Petrie attempted to revoke the power of attorney and his attorneys of record ordered the writ returned. Demurrer to the complaint sustained. Plaintiff brings error. Affirmed.

The Court by Stayton, J. * * * No interest whatever in the judgment was conveyed to the appellant by Petrie's power of attorney to him; it was not made to secure to the agent an existing right or obligation, but solely as a means by which Petrie was seeking to collect his judgment, out of [*400] which, if collected by him, the appellant was to receive as compensation a named part of the sum collected. This case, in its facts, is very similar to the cases of *Hartley and Minor's Appeal*, 53 Pa. St., 212; *Blackstone v. Buttermore*, 53 Pa. St., 266, in which it was held that powers were revocable.

The legitimate inference from the petition is that Good, Bower and Coombes were the attorneys of record who had obtained the judgment in favor of Petrie, and that the power of attorney executed by Petrie on the 8th of July to the appellant was revoked on the 6th of August succeeding.

Under such circumstances the law does not impose upon a sheriff who has process in his hands the duty of determining at his peril whether, in executing it, he shall obey the instructions of the undoubted owner of the judgment under which the process issued, or the instructions of his recognized attorneys, or shall obey the instructions of a person who claims nothing more than an agency, out of the exercise of which he expects to become entitled to a portion of the proceeds of the property to be sold under the process, and this where the power of such person is denied by the owner of the judgment.

It is the duty of a sheriff who has process in his hands to obey all lawful instructions of the owner of the judgment in its execution, and he that assumes the right to control such officer, if he be not the person in whose favor the judgment was rendered, or his recognized attorney, must clothe himself with the

legal or equitable title to it. Any other rule would lead to interminable difficulty, and every sheriff would have to judge at his peril as to the collateral rights of every person who might set up a claim. An execution is the process of the owner of the judgment, and he has the right to control it even as against his own attorney of record.

In the case of *Crenshaw v. Harrison*, 8 Ala., 343, the rule is thus expressed: "Generally speaking, the sheriff is a mere executive officer, and is bound to pursue the mandate of the process in his hands, unless otherwise instructed by the plaintiff upon the record, or by his attorney; beyond this, it is possible he may be permitted to recognize the interest of a stranger, if that interest is admitted by the plaintiff on the record, or his attorney. But he is not authorized to constitute himself a judge to determine questions of conflicting interests. To permit him to do so would lead to the greatest abuse." Many authorities upon this subject are cited in *Patton v. Hamner*, 28 Ala., 618, 622. * * *

Affirmed.

ANDREWS v. MORSE.

12 Connecticut 444, 31 Am. Dec. 752. (1838)

Attorney's Lien—Control of Execution—Effect of Payment to Judgment Creditor.

Bill for injunction by Andrews to restrain Phelps, Hungerford, and Cone from enforcing an execution against Andrews, which was based on a judgment recently recovered against him by Morse in an action in which Phelps, Hungerford, and Cone acted as attorneys for Morse. Andrews had paid the amount of the judgment to Morse after the execution was issued, and after he received notice from the attorneys that their fees had not been paid, that they demanded payment to them, that they claimed a lien on the judgment for the amount of their fees, etc., and that Morse had nothing but the judgment from which to pay them. A temporary injunction was granted and the case reserved for the opinion of this court. Bill dismissed.

Ellsworth, for plaintiff.

Hungerford, for defendants.

The Court by Church J. * * * In the case of *Rumrill v. Hunt-*

ington, 5 Day (Conn.) 163, Trumbull, J., [*447] in giving the opinion of the court, says: "It is a general principle, that an attorney has a lien for his services and expenses on the papers and securities of his client, etc. But an attorney has no lien upon a judgment obtained in favor of his client, which can vary or affect the rights of a stranger." And we said in the case of *Gager & al. v. Watson*, 11 Conn. 168, that "the attorney's lien upon judgments is subject to the equitable claims of the parties in the cause, as well as to the rights of third persons, which cannot be varied or affected, by such lien." A claim of the attorney to this extent was recognized in the following cases, decided by the court of common pleas and king's bench. *Wilkins et al. v. Carmichael*, Doug. 101; *Mitchell v. Oldfield*, 4 Term Rep. 123; *Read v. Dupper*, 6 Id. 360; *Ormerod v. Tate*, 1 East 464.

In the case of *Pinder v. Morris*, 3 Caines (N. Y.) 165, the supreme court of the state of New York held that, if the defendant pay to the plaintiff the debt and costs, after notice from the attorney, he pays in his own wrong; and this is the principle established or recognized in the last two cases cited from the English books. This subject is well considered, by the same court, in the case of *Martin v. Hawks*, 15 Johns. (N. Y.) 405; and the claim of the attorney placed, as we think, upon its true ground. In that case, the attorney is treated in regard to his lien, as the assignee of a chose in action is considered, who takes it subject to all the rights and equities attached to it. And this is considered the true doctrine, by Lord Mansfield, in the case of *Welsh v. Hole*, Doug. 238, and by Lord Kenyon, in the case of *Read v. Dupper*, 6 Term Rep. 361, and by the court of errors of the state of New York, in the case of *Nicoll v. Nicoll*, 16 Wend. (N. Y.) 446. This principle is entirely consistent with the doctrine of this court in the cases of *Rumrill v. Huntington*, and *Gager et al. v. Watson*.

If we apply this principle to the facts in this case, we cannot fail to discover, that the claims of the attorneys here have not been defeated, by any legal or equitable rights of others; but exist as perfectly against Andrews, the execution debtor, who prosecutes this injunction, as against their own client, Morse. The execution was delivered, by the attorneys, to the officer, with a notice of their

lien, and with directions to collect [*448] and pay over its proceeds to them. And the same notice was given to the debtor in the execution, before any thing had transpired, changing the relative rights or duties of any of the parties interested, and before any thing had been paid on the execution. Under these circumstances, this debtor had no equitable claims. He paid with full notice of the attorneys' prior claim, and in defiance of it. In this, his conduct was collusive and fraudulent; and the payment was made in his own wrong.

We shall advise the superior court, that the injunction in this case ought to be dissolved; and that the plaintiff take nothing by his bill.

In this opinion the other judges concurred.

Bill to be dismissed.

CLARKSON v. WHITE AND ARNOLD.

4 J. J. Marshall (Kentucky) 529, 20 Am. Dec. 229. (1830)

Execution without Authority—Burden of Proof—How Objection Available—Who Liable—Ratification.

Bill by Clarkson, as a surety on a replevin bond, against White and Arnold, to enjoin a *feri facias* on the bond and for other relief. From a decree dismissing the bill, complainant appeals. Affirmed.

The injunction was asked because Arnold, the clerk, issued the execution without authority from Mrs. White, the judgment creditor.

Mills and Brown, for plaintiff.

Hanson, for defendant.

The Court by Robertson, C. J. * * * There was no semblance of equity against Mrs. White. She had done nothing which could have the effect of releasing the plaintiff from the judgment; and the last execution was credited with all except the interest. [*530] Nor does it appear that Arnold acted without authority. But if he did so act in issuing the execution, its enforcement should not, on that ground alone, be enjoined, because Mrs. White, the creditor, approved and ratified the act of the clerk in issuing the execution. As against Arnold, the clerk, there is no

equity in the bill. 1. Because his act (in issuing the execution) was not illegal. 2. If it be illegal, the remedy is exclusively legal as against him. * * *

Wherefore, the decree dissolving the injunction and dismissing the bill is affirmed. * * *

SOWLES and WIFE v. HARVEY.

20 Indiana 217, 83 Am. Dec. 315. (1863)

Execution—Right to Issue—Validity of Sale.

Suit to set aside a sheriff's sale. Demurrer to the complaint sustained. Plaintiffs appeal. Affirmed.

The complaint alleges that the plaintiffs recovered a judgment for \$575, Feb. 1861, in the Hendricks circuit court; that the clerk of that court issued an order of sale thereon without plaintiffs' orders ten days after the adjournment of that term; that the sheriff thereon levied land worth \$600, being all of the property of the judgment debtor, and sold it on the highest bid, for \$165, to the debtor's father-in-law, the defendant herein, who paid the amount of his bid to the sheriff and received a deed, April, 1861; and that plaintiffs had tendered him the amount he paid, and demanded a conveyance of the property. There is nothing to show that the defendant was not a *bona fide* purchaser. The complaint prays that the sale be set aside.

The Court by Perkins, J. * * * The clerk erred in the case, in issuing the order of sale without the direction of the judgment plaintiffs or one of them; but a *bona fide* purchaser would not be prejudiced by the error. He would have the benefit of the presumption that the officer had done his duty. *Lewis v. Phillips*, 17 Ind. 108 [79 Am. Dec. 457]. The difference between the sum bid for the property at the sale and its actual value, was not so great as *per se* to render the sale void. *Swope v. Ardery*, 5 Ind. 213. Davis's Ind. Dig. 537.

Per Curiam.—*The judgment is affirmed with costs.*

6. AGAINST WHOM THE WRITS MAY BE ISSUED.

Under this head we will, for review, inquire again as to whether those against whom attachments are sought must be absconding, concealed, or fraudulent debtors, and the like, and what constitutes each. Therefore, prepare again on pages 147 to 176, inclusive.

DILLON v. BURNHAM.

43 Kansas 77, 22 Pac. 1016. (1890)

Presumption of Regularity—Judgment against Infant—Right to Execution.

Action by Burnham, Hanna, Munger & Co. against Henry J. Dillon. From judgment for plaintiffs on special verdict defendant brings error. Affirmed.

Dawson Smith, for appellant.

W. A. McCartney, J. M. Thomas and J. D. McFarland, for appellees.

The Court by Johnston, J. There are two questions presented for our consideration: First, was Dillon bound by the contract which he made? And second, could a judgment based thereon be enforced against his property? In the absence of the evidence, we must assume that there was sufficient testimony to sustain the special findings and general verdict of the jury. From the findings, it appears that Dillon was only twenty years of age when the goods were purchased and the contract in question was made by him, and that he was still a minor when the trial occurred. * * * We think the contract binding upon Dillon, and that the court ruled correctly in rendering judgment against him. It is not necessary to follow counsel for plaintiff in error in his argument as to the status of minors under the common law, as we must be governed by our statutes. * * *

The second point raised by plaintiff in error must also be overruled. Where the contracts of a minor are binding upon him and may be reduced to judgment, they certainly may be enforced by appropriate writs or proceedings. It would be idle to

authorize the enforcement of a contract and the rendition of a judgment if such judgment could not be made effective when given. As the courts have authority to require a minor who cannot disaffirm to appear and answer, and to be bound by judgment rendered against him, it follows that, in the absence of statutes to the contrary, writs of attachment, or other appropriate proceedings to require a satisfaction of the judgment, may be obtained as in other cases. *Freeman on Executions*, § 22. The judgment of this district court will be

Affirmed.

Scudder, J. "It was next objected, that the writ should have been quashed on the defendant's motion, because it could not be issued against a female debtor. This point was based upon *Pullinger v. Van Emburgh*, 1 Harr. [N. J.] 457. * * * As the case referred to held that a female debtor could not be proceeded against by writ of attachment, because she could not be held to bail in a civil suit, females being exempt from imprisonment or arrest for debt, it evidently appears that the legislature, soon after this decision, and with it in mind, relieved females from the liability to arrest under proceedings in attachment, and, in the same statute, enacted, that a writ of attachment might be issued against them." *Davis v. Mahany and Grover*, 38 N. J. L. (9 Vroom) 104.

It has been held that "if a personal suit can be maintained at law against a lunatic, there is no reason why a proceeding against his estate by attachment is not valid." *Weber v. Weitling*, 18 N. J. Eq. (3 C. E. Green), 441.

It appearing that the defendant was insane when he left the state, attachment against him upon the ground of his departure will be set aside. *Chambers & McKee Glass Co. v. Roberts*, 4 App. Div. (N. Y.) 20.

Colt, J. "The property of a person under guardianship may be taken on execution issued against him. It may, therefore, be attached on mesne process in all the usual modes, including the trustee process. The remedy to recover a debt against the ward by suit upon the guardian's bond is not exclusive." *Simmons v. Almy*, 100 Mass. 239.

WILDER v. ELDRIDGE.

17 Vermont 226. (1845)

**Infant Garnishee—As Debtor—As Custodian—Effect of Payment or
Delivery after Service—Appointing Guardian Ad Litem—
Becoming of Age Before Trial.**

Trustee process by Wilder & Snow against Truman S. Eldridge, principal debtor, in which Daniel Wright and Samuel S. Wright were summoned as trustees. Plaintiffs except to judgment discharging S. S. Wright. *Affirmed*. Plaintiff sought to

charge S. S. Wright because he had purchased a horse of Eldridge for \$75 and given his note in payment.

Woodbridge and J. Pierpoint, for plaintiffs.

E. D. Barber, for trustee.

The Court by Bennett, J. The only question in this case arises upon the disclosure of Samuel S. Wright. It is argued, that, upon general principles, a minor can in no case be charged as trustee by means of the trustee process. It would seem, if there is an attempt to charge him upon the ground of having in his hands the *credits* of the principal debtor, that the plea of infancy should avail the trustee, equally as if sued directly by the principal debtor; but if the minor is liable to the principal debtor for *necessaries*, no good reason is perceived why he may not be charged as his trustee, to the extent of such liability, by means of the trustee process.

So, if he has the *specific goods and chattels* of the principal debtor in his hands, we see no sufficient reason why they should not be reached by the trustee process. The statute provides that *every person*, who has the goods, effects and credits of the principal debtor intrusted to, or deposited in, his hands, may be summoned as trustee, and the goods, effects and credits be attached, and held to respond the judgment, that shall be recovered against the principal debtor. The general words of the statute include minors, though it is true the court might, upon sufficient reasons, restrain [*230] these general words, by holding that minors did not come within the equity of the statute.

But we do not apprehend that there is any good reason for restraining these general words. The attaching creditor takes the place of the owner of the property attached in the hands of the trustee. No new liability is imposed upon the trustee, and he has only to deliver the property to the officer, who shall have the execution, instead of delivering it to the principal debtor. If he refuses, he is liable to the attaching creditor, to the value of the goods. The minor would be liable, to the extent of the value of the goods, to the owner of them, provided there had been no attachment. In such case the minor stands in the nature of a trustee, and holds the goods as such, and should, upon common principles, be held liable.

But a minor, when sued, is not capable of conducting the suit; and it is as necessary that he should defend by guardian in a trustee process, so long as he is a minor, as in other cases. To give the trustee process the effect of an attachment of the goods, against the minor, from the date of the service, his guardian, if he had one, should have been cited in. If this is not done, the plaintiff must, at his peril, apply to the court to have a guardian *ad litem* appointed. But in the present case, as the trustee became of age before the disclosure was made, there was, at that time, no occasion for the appointment of a guardian. The property, however, had, before this, and while the trustee was a minor, been given up to the principal debtor, in pursuance of the original contract.

Had the trustee, in this case, been of age, and had elected, after the service of the trustee process, to rescind the contract and demand his note, it would seem as if he would thereby be excused from delivering the property to the principal debtor, but should, from that time, treat it as in the custody of the law. But as, in this case, the property was given up by the trustee, while under age, though after the service of the process, and while he was incapable of conducting his defence, and, in contemplation of law, not understanding his rights, or liabilities, we cannot consider the attachment, at that time, of such binding force against him as to render him liable at all events as trustee in this action. [*231]

The judgment of the county court, discharging this trustee, is

Affirmed with costs.

KENISTON v. LITTLE.

30 New Hampshire 318, 64 Am. Dec. 297. (1855)

Liability of Sheriff Acting under Process—Judgments against Administrators—Descriptio Personæ—Whose Property Liable.

An action of trespass by Keniston against Little, deputy sheriff of Merrimac county, for taking certain cattle of the plaintiff under the execution mentioned in the opinion. Case submitted to this court on agreed facts. Judgment for defendant.

Butterfield & Hamlin, for the plaintiff.

N. B. Bryant, for the defendant.

The Court by Bell, J. The defendant, a deputy sheriff, took certain chattels, property of the plaintiff, upon an execution in fa-

vor of Knowlton against him, and sold them, and applied the proceeds in discharge of the execution. The plaintiff brings against the officer an action of trespass, and the question is, if the latter can justify himself under this execution.

And first, it is said, in behalf of the plaintiff, that the judgment recited in the execution being "against Benjamin C. Keniston of, etc., administrator of the estate of James M. Knowlton, late of, etc., deceased," is a judgment against the plaintiff, in his capacity of administrator, and the precept to cause the sum recovered "to be levied of the goods, [*322] chattels, or lands of the said debtor, is limited to the goods, chattels or lands of the debtor, as administrator of Knowlton. If this view is correct, then it is clear that the officer cannot justify a levy upon the private estate of the administrator, because his precept gave him no authority to levy upon anything but the estate of the intestate.

At common law, the judgment *de bonis testatoris* is rendered "that the said John recover against the said Jane, executrix as aforesaid, ——— pounds, etc., to be levied of the goods and chattels, which were of the said J. D., deceased, at the time of his death, in the hands of said Jane to be administered." 5 Went. Pl. 414; Imp. P. C. P. 483; 4 Lill. Ent. 475, 478, 504; 10 Went. Pl. 458; *Piper v. Goodwin*, 23 Me. 251; *Atkins v. Sawyer*, 1 Pick. (Mass.) 353; *Merritt v. Seaman*, 6 N. Y. (2 Seld.), 168. A similar form of entry is used in case of a judgment against an heir. 2 Lill. Ent. 504. And a like form was adopted in the case of a judgment to be levied upon property attached, where a subsequent bankruptcy had been pleaded. *Kittridge v. Warren*, 14 N. H. 509.

By the case of *Pillsbury v. Hubbard*, 10 N. H. 224, it appears that such has been the practice in this state, and though a loose and negligent practice had sprung up in one or two counties, of rendering the judgment against the executor or administrator generally, yet the learned chief justice declares the practice to be unfounded and without authority. The writ of execution should recite the judgment as "to be levied of the goods, etc., of the deceased," and the precept should be to levy on the goods, etc., of the deceased. 2 Lill. En. 584, 586; 10 Went. Pl. 321, 322.

Though a plaintiff is described as executor or administrator,

yet if it is not alleged that the promises were made in the lifetime of the testator, or were made to him, or were made to the plaintiff as administrator, the action will be [*323] regarded as brought in his individual, and not in a representative character. *Worden v. Worthington*, 2 Barb. Sup. (N. Y.) 368; *Henshall v. Roberts*, 5 East (Eng.) 150; *Christopher v. Stockholm*, 5 Wend. (N. Y.) 36; 1 Chit. Pl. 151.

In *Merritt v. Seaman*, 6 N. Y. (2 Seld.) 168, the declaration commences: C. M., executor, etc., of J. S., deceased, complains, etc., without any other indication that the suit was brought by him in a representative character, and judgment was rendered against the plaintiff, upon a set-off, "to be levied of the goods of the testator, in his hands to be administered," and it was held that this mode of describing the plaintiff as executor, was to be regarded as merely a *descriptio personae*, in no respect changing the rights of the parties, and that the action being brought in the plaintiff's individual character, a judgment against him in a representative character was erroneous.

We, therefore, regard this execution as running against the plaintiff, in his individual character, and his own goods and estate were liable to be levied upon under it.

The principle is settled that a sheriff has nothing to do with the propriety of the process under which he acts, provided the court has jurisdiction, and the process is regular upon its face. *State v. Weed*, 21 N. H. (1 Foster) 262.

The jurisdiction of the court of common pleas to issue an execution for costs is not denied. But it is contended that an execution for costs against an administrator should run not against the goods of the administrator himself, but against the goods of the deceased, in his hands to be administered. If this is a proposition universally true and without any exception, it might furnish ground for an argument that the execution must have been issued, in this case, either erroneously or irregularly. If otherwise, if there is any case in which an execution may properly issue against the proper goods of an administrator, then the execution here is well enough, so far as the officer is concerned. He is not bound

to look beyond the face of the execution, and if there is [*324] nothing there which shows it to have issued improperly, he is not bound to inquire further.

The case of *Pillsbury v. Hubbard*, before cited, is a direct authority that where the cause of action is alleged to have arisen after the death of the testator or intestate, and the executor or administrator might sue in his own right, without describing himself as such, judgment may well be entered against him *de bonis propriis*, the allegation that he was executor or administrator being considered in such case as a *descriptio personae*.

So that upon the face of the execution there was nothing that indicated any error or irregularity.

If the process here did issue either erroneously or irregularly, the court having jurisdiction, it is not void, but is at most voidable. If erroneous, a party even may justify under it, whatever was done by virtue of it while it was in force; and if irregular, it is a justification for the party till set aside. Much more must it be so in the case of an officer. See *Blanchard v. Goss*, 2 N. H. 491, where this subject is ably discussed by *Richardson, C. J.*

Judgment for the defendant.

GRAIGHLE v. NOTNAGLE.

1 Peters (U. S. C. C.) 245, Fed. Cas. No. 5,679. (1816)

Garnishment, Attaching Goods in Hands of Plaintiff—Action by Man Against Himself—Necessity of Three Parties—Necessity of Taking All Statutory Steps—Why—English Decisions.

Lewis, Ingersoll, J. R. Ingersoll, and C. J. Ingersoll, for plaintiff.

Mr. Rawle, for defendants.

Action of debt, in the United States circuit court for the district of Pennsylvania, by Graighle of France, against Notnagle and Montmollin of Philadelphia. The defendants pleaded that since the last continuance of this action, a writ of attachment, issued out of this court in an action by Montmollin against the plaintiff herein, had been levied on the money and effects sued for in this action. The plea prays judgment that the writ in this action be quashed. To this plea there was a general demurrer. Demurrer

overruled. The question argued at the bar was whether a creditor can lay an attachment in his own hands.

The Court by Washington, J. * * * The ordinary proceedings in foreign attachment commence with the writ of attachment; which is to be served on the goods and chattels of the debtor, in whose hands or possession the same may be found; or upon any person, who may be indebted to the defendant in the attachment. Upon the return of the writ, the garnishee is to enter an appearance, which is generally by attorney, unless, under the provisions of the act of assembly of Pennsylvania, a clause of *capias* is inserted in the writ; in which case he must give bail for his appearance. Judgment by default is then entered against the defendant, as a matter of course, at the third court after the writ issued; unless he puts in bail. After this, a *scire facias* issues against the garnishee, to show cause why the plaintiff should not have execution against him, of the defendant's property attached in his hands. To this writ the garnishee may plead the general issue, *nulla bona*; or any special matter, tending to show that the effects in his hand, or the debt due by him to the defendant, ought not to be condemned. If the issue is found against the garnishee, or if he should not appear and plead, judgment is rendered against him, upon which an execution will issue. In aid of this process, the plaintiff may compel the garnishee to answer, on oath, to interrogatories, to be propounded to him; calculated to draw from him a [*247] discovery of all the property of the defendant, which he has in his hands, and of the debts which he may owe him.

The absurdity of process issuing against the plaintiff in the attachment, at his own suit, his answering his own interrogatories, and being subject to execution, for a debt due to himself, are strongly relied upon to prove that an attachment cannot be laid in the hands of the plaintiff in that suit.

There is certainly at first view great weight in this argument; and unless the difficulties upon which it is founded can be removed, by a fair and reasonable construction of the acts of assembly, it must prevail. It may however be observed, that there are strong reasons for believing that the exclusion of a creditor holding in his

hands the property of his debtor, from the benefit of the attachment law, was not in the contemplation of the legislature. The law is remedial, and the words of it general, extending the remedy to all creditors, without distinction; and it would seem strange that the only person who cannot obtain justice against a non-resident should be one who has in his hand the funds out of which that satisfaction may be had. There would seem to be a manifest injustice, that the plank upon which he might save himself, and upon which he may probably have relied, should be taken from him, and given to other creditors. If, however, such be the necessary construction of the law, the court must decide in conformity with it, however they may regret it.

Generally speaking, there are three parties to a writ of foreign attachment. The plaintiff, or creditor; the defendant, or debtor; and the garnishee, who, in relation to the controversy between the plaintiff and defendant, stands very much in the situation of a stake holder. Between either of those parties and himself, there is nothing adverse, unless he makes it so by his own conduct. It is perfectly immaterial to him, which of the parties succeeds. He is only to act *bona fide*, by discovering what property of the defendant is in his hands; and as he cannot himself decide between the contending parties, he cannot [*248] deliver over the property to either, without the judgment of the court. The proceedings therefore against him are merely auxiliary to the principal suit, and are intended to secure the end for which it is instituted. But if, from the nature of the case, the end can be obtained without the use of *all the means* provided by the law, there would seem to be no impropriety in employing such of them only as would be necessary to arrive at the proposed object. Because the effect of the suit might be defeated, unless the plaintiff were armed with coercive measures against the garnishee; he certainly cannot be required to use those measures, whether they are necessary or not. The garnishee, therefore, being himself plaintiff in the writ of attachment, there can be no necessity for a summons, *scire facias*, interrogatories, or any other coercive process against him. * * *

[*249] * * *

That a creditor may lay a foreign attachment in his own hands

according to the custom of London, is clearly established. *Paramore v. Pain*, Cro. Eliz. (Eng.) 598; see also Coke's Entries, 139 b. * * * [*254] * * *

It is not perceived that any injustice is done to the defendant in the attachment, or that the laws of the state of Pennsylvania or any general principle of law, are violated by this mode of proceeding. It is of no consequence to the defendant whether a trial be had or not, for the purpose of ascertaining what effects of his the plaintiff has in his hands; or what is the amount of debt he owes, or even what effects are in the hands of the garnishee, where there is one. For if in the latter case, the garnishee cannot controvert the debt claimed by the plaintiff, by confessing himself to be a debtor to the defendant, or to have effects of his in his hands, (which there is no doubt he may do, without danger to himself), judgment goes against him, as a matter of course; although, without such judgment, he cannot deliver over the property or pay the debt to the plaintiff. In the former case, the plaintiff, who is *quasi* a garnishee, confesses effects in his hands, which he retains, in consequence of the judgment to satisfy his own debt; but in this case, the defendant in the attachment is allowed, in an action against the plaintiff, to traverse the plea, and thus to contest the debt recovered in the attachment. In fact, the only protection [*255] of the defendant in either case, consists in the security to restore, which the plaintiff must give. Nor can it be said that the law of this state is violated, because such of its provisions as are inapplicable to the case, are not pursued.

Upon the whole, this court feels itself authorized to sustain a foreign attachment, which is laid in the hands of the plaintiff; and I am satisfied that in doing so, we not only fulfill the spirit and intention of the law, but sanction a practice both just and convenient. In this case, the demurrer must be overruled, and the plaintiff will be allowed to put in a replication, if he chooses so to do.

This is the leading American case on the subject, and is supported by the weight of authority; but contrary decisions will be found in Rhode Island, New Hampshire and Massachusetts. *Knight v. Clyde*, 12 R. I. 119; *Hoag v. Hoag*, 55 N. H. 173; *Belknap v. Gibbons*, 13 Metc. 471. For review of decisions see Rood Garnish. § 39.

GARDNER v. MOBILE & NORTHWESTERN R. CO.

102 Alabama 635, 48 Am. St. 84, 15 South, 471. (1892)

Bill to Quiet Title—Sale on Execution Against Ry. Co.—What Property Liable to Process—Exemption, Duration, Why—Fee or Easement, Importance, Burden of Proof—Power of Corporations to Hold—Attorney's Power to Assign Judgment, Statutory Form—Ratification—Execution in Name of Assignee—Effect.

Bill in equity by the Mobile & Northwestern Railroad Co. against F. G. Ruffin, F. G. Bromberg, Lucy R. Gardner, individually, and as the administratrix of W. H. Gardner, deceased, and Mary Henry, individually, and as the executrix of Thomas Henry, deceased, to remove cloud from the title to certain lands. From a decree for complainant, defendants appeal. Reversed.

Overall, Bestor & Gray, for Mrs. Gardner.

Austill and Pillans, Torrey & Hanaw, for complainant.

The Court by Stone, C. J. The bill was filed to vacate a sale of lands made by the sheriff of Mobile county, under executions which were issued from the circuit court of that county, founded on judgments rendered against the appellee. It seeks a cancellation of the conveyance made by the sheriff to the purchaser, and of subsequent conveyances dependent on it, and prays an injunction to prevent alleged trespasses on the lands. The validity of the sale by the sheriff is impeached on the ground of alleged [*642] irregularities in the issue of the executions; the payment of one of the judgments; and because the lands were the right-of-way of the appellee, and, as is asserted, not the subject of levy and sale under executions at law.

Prior to the issue of the executions under which the sales were made, the judgments had been assigned. The assignments were not made in the mode prescribed by the statute, (Code, § 2927); and the mandate of the executions was, that the moneys made should be accounted for to the assignee of the judgments. In all other respects the executions corresponded to the judgments. Judgments have the assignable quality of choses in action, and may be transferred by parol or in writing. If a statutory mode of assignment is provided, it is cumulative, in the absence of express words inhibiting other modes of assignment. 2 Freeman on

Judgments, § 422. The assignment, however made, passes an equity which courts will recognize and protect. It entitles the assignee to sue on the judgment or to issue execution thereon in the name of the assignor, and is beyond his control or interference. 2 Brick. Dig. 153, §§ 308-17. The statute to which we have referred does not lessen the assignable quality of judgments, nor limit the mode of assignment. It is cumulative, entitling the assignee, if the assignment is made in the mode provided, to sue on the judgment, or to the issue of execution thereon for his use, in the name of the plaintiff whether living or dead. It in this way dispenses with the necessity of revivor in the event of the death of the plaintiff; and, under the operation of § 2595 of the Code, he may make himself the sole party on the record. The error in the mandate of the executions is, at most, a mere irregularity, incapable of injury to the appellee, and because of such irregularity a court of equity will not interfere to vacate a sale made by the sheriff. 2 Freeman on Executions, § 310; *Ray v. Womble*, 56 Ala. 32; *Lockett v. Hurt*, 57 Ala. 198.

One of the judgments, the one, it is asserted, that was paid prior to the issue of execution thereon, seems to have been assigned by the attorney of the plaintiff therein. Without special authority, an attorney at law cannot assign a judgment he may have obtained for his client. The authority, or a ratification by the client, [*643] may be inferred from circumstances. The assignment was made many years before the issue of the last execution, and so far as is now shown, its validity has never been questioned by the client. The silent acquiescence for years by the client is evidence that the attorney had authority to make it, or of a subsequent ratification. The contention of payment of this judgment was not ascertained by the chancellor to be true, and we find no reason to doubt the correctness of his conclusion.

The other judgment, rendered in favor of Burgess, prior to the issue of the execution under which the levy and sale were made, had become dormant; more than ten years having elapsed after the teste of the last preceding execution. The execution was irregularly issued and was voidable, but it was not void. 1 Freeman on Executions, §§ 28-30; *Sandlin v. Anderson*, 76 Ala. 405;

Steele v. Tutwiler, 68 Ala. 107. On a proper application, seasonably made, the court of law would have quashed it. *McCall v. Rickarby*, 85 Ala. 152. Such an application must have been made with reasonable diligence; unexplained *laches* would have been fatal to it. *Bank of Genesee v. Spencer*, 18 N. Y. 150; *Cowan v. Sapp*, 74 Ala. 44; *Ponder v. Cheeves*, 90 Ala. 117.

More than two years elapsed after the issue of the execution and the levy and sale, before the filing of the present bill. Whether the court of law would, at that day, have entertained an application to vacate the sale, because of the irregularity in the issue of the execution, it is not necessary to consider. Conceding that court would have intervened, the jurisdiction was exclusive. The rule is very general, that a court of equity will not interfere to vacate a sale under legal process, on account of irregularity in the issue of process, or in its execution; but, as is properly said, "the application ought to be made to the court issuing the writ, and if made elsewhere ought not to be entertained." There must be accident, surprise, mistake, or fraud, or some fact or circumstance affecting the sale itself, and not resting on the irregularity of the process, or irregularity in its execution, before a court of equity will take jurisdiction to vacate it. There is not in this case averment or evidence of either of these conditions. 2 Freeman on Executions, § 310; *Ray v. Womble*, 56 Ala. 32; *Lockett v. Hurt*, 57 Ala. 198; *Cowan v. Sapp*, 74 Ala. 44. [*644]

The more important question is, whether the lands were the subject of levy and sale under the executions; and this depends, materially, upon the quality of the estate residing in the appellee. The allegation of the original bill is, that they were acquired for a right-of-way, under the charter of the appellee, "by purchase, condemnation and otherwise."

The general law providing for the creation and regulation of railroad corporations,, approved December 29, 1868, under which the appellee was incorporated and organized, contains the grant from the state of the franchises and powers it claims to have acquired. It did not confer the power of acquiring lands by proceedings in condemnation, or otherwise than by gift or purchase; and did not limit the estate or interest which could be acquired.

The act of March 1, 1871, passed after the creation and organization of the appellee, conferred the power to resort to compulsory proceedings in condemnation for the taking of lands.—Acts, 1870-71, pp. 55-60.

There is no written evidence of the title of the appellee introduced; no other than vague and indefinite parol evidence, which seems to have been received without objection, indicating that parts of the lands were acquired by condemnation, and other parts by gift or purchase, not distinguishing between them. The grant of power to acquire, hold and convey lands for a right-of-way, or other uses, by the law of 1868, is general and extensive. The third section confers power to "acquire and convey at pleasure, all such real and personal estate, as may be necessary and convenient to carry into effect the objects for which it was created;" and the 15th section provides for the acquisition, by purchase or gift, of any lands in the vicinity of the road, or through which it may pass, so far as may be deemed convenient or necessary to secure the right-of-way, or such as may be granted to aid in the construction of the road, and to hold and convey the same in such manner as the board of directors may prescribe. Acts, 1868, pp. 462-466.

It is an incidental power of every corporation, unless restrained by statute, to purchase and alien lands necessary for the exercise of its corporate powers, and this, "independent of positive law" conferring such power. Says Ch. Kent: "All corporations have an absolute *jus disponendi* of lands and chattels, neither limited as to [*645] objects or circumscribed as to quantity."—2 Kent, 281. And railroad corporations may take a fee in lands although corporate existence is limited to a term of years. 1 Morawetz Corp., § 330; *Davis v. M. & C. R. R. Co.*, 87 Ala., 633; *Nicoll v. N. Y. & E. R. R. Co.*, 12 N. Y. (2 Kernan) 121.

What was the quantity and quality of the estate the appellee had in the lands? The power to acquire an estate in fee, by purchase or gift, for a right-of-way, or for other uses, was very broad and general, and, according to the allegations of the bill and the scant evidence introduced, the lands were acquired, certainly in part, by the exercise of this power. If an easement only—the right to construct, maintain and operate a railroad in and upon

them—was acquired, it is not possible to ascertain the parts subject to the easement, distinguished from the parts in which a fee was acquired. As the case is presented, the more probable inference is, that the appellee had an estate in fee in the lands, and not a mere easement. If the latter is the nature or character of its estate or interest, entitling it to hold in exemption from levy and sale, the facts should have been shown by certainty of pleading and satisfactory evidence.

As a general rule the property of all private corporations is as subject to legal process for the satisfaction of debt as is the property of natural persons. An exception obtains, however, when the corporation is created to serve public purposes charged with public duties, and is in the exercise of its franchise and in the performance of its duties. Then, on considerations of public policy, without regard to the nature or quality of the estate or interest of the corporation, according to the weight of authority, such property as is necessary to enable it to discharge its duties to the public, and effectuate the objects of its incorporation, is not subject to execution at law. The only remedy of a judgment creditor is to obtain the appointment of a receiver, and the sequestration of its income or earnings.—1 Freeman on Executions, § 179, and authorities collected in notes; 2 Morawetz Corp., § 1125; *Gue v. Tide Water Co.*, 65 U. S. (24 How.) 257; *Overton Bridge Co. v. Means*, 33 Neb. 857; s. c. 29 Am. St. 514, and authorities cited.

The exemption from levy is maintainable, however, only upon the theory that the corporation is created for [*646] the furtherance of public purposes, of such importance to the public that there must not be private interference with such of the corporate property as is essential to effectuate these purposes; and presupposes that to these purposes, the property is being applied. Property not necessary to effectuate these purposes, if acquired by gift or purchase, may be taken by legal process for the satisfaction of debts.—2 Morawetz Corp., § 1125. And so may personal property employed, and necessarily employed, in the exercise of corporate franchises.—1 Freeman on Executions, § 179. When the lands were levied and sold, the appellee as a corporation had

become inert, and had life in a name only. By non-user it had subjected itself to the penalty of forfeiture by a direct proceeding at instance of the state, while only in the absence of such forfeiture, it could retain the capacity to exist as a corporation. It was an existence in name only. It was not, and had not been for a period of 13 or 14 years, in the exercise of its corporate franchises. The line of railroad had been graded, embankments, bridges and trestles had been erected and constructed on the lands in controversy. The work was incomplete, and, for more than sixteen years prior to the levy and sale, had been abandoned. From the only part of the road which was completed, more than fourteen years before the levy and sale, the rails and cross-ties were removed and sold to a street railway company; and the locomotive and flat cars, the only rolling stock it seems to have ever possessed, and which had been utilized solely to aid in construction, were sold and carried away. Now, conceding that the property of the appellee, essential to the exercise of its franchise and to effect the public purposes contemplated in its creation, may be exempt from levy and sale under legal process, can the exemption continue after the franchises have been abandoned? Can it exist when the necessity for its existence has terminated? We think it is co-extensive with the performance of the public purposes the corporation was intended to promote, and when these purposes are abandoned the exemption ceases, and the property stands in the condition of property not necessary to enable the corporation to perform its duties to the public.—Freeman on Executions, § 179.

In *Benedict v. Heineberg*, 43 Vt. 231, a railroad [*647] company had ceased to use a portion of its road, and was removing the rails necessary to its operation. The company owning in fee the part of the road so abandoned, it was held that such part was subject to levy and sale under execution at law. The decision rests upon the proposition, that the land so abandoned was not being held for public uses, or for use as a railroad. In that case, there was an abandonment in fact and intent of the public uses. Here, there was an abandonment in fact. There may have been a lingering hope that, at some indefinite time in the future, the corpora-

tion might resume activity, and apply the lands to the uses for which they were acquired; or that they could be sold to some other company having the means or credit to complete the construction of a line of railroad. However this may be, the fact remains that there was not an exercise of corporation franchises for years, and the lands were not applied to public uses. Practically there was no pretense that they were held to enable the company to discharge its public duties. We are of opinion they were subject to levy and sale under the executions; that the sale was valid passing to the purchaser the fee vested in the appellee. If the lands were not subject to execution, what remedy could the judgment creditors have? There was no income or earnings to be sequestered. The result of the contention would be that the lands were placed beyond the reach of creditors, and yet the appellee held the fee, having power and capacity to sell and convey it, but applying it to no public uses, and earning no income.

The question we have considered, the right to levy an execution at law, on lands owned and held in fee, as the right-of-way of a railroad corporation, the corporation having become inert and having ceased all user of its franchises and all performances of its public duties, was not considered in *East Ala. Railway Co. v. Visscher*, 114 U. S. 340. All that was considered and decided in that case was, whether the mere right-of-way of a railroad company, "a mere easement in the land, to enable it to discharge its functions of making and maintaining a public highway, the fee of the soil remaining in the grantor," was the subject of levy and sale under execution at law. The court expressly declared that it was "not necessary to discuss the general question as to the right to levy an execution at law on property [*648] owned by a railroad company in fee." Nor is it now necessary to express an opinion whether under any circumstances, the easement of a railroad company may or may not be the subject of levy and sale under execution at law.

The assignments of error are numerous, presenting many questions which have been discussed by the respective counsel. The conclusion we have reached renders it unnecessary to consider them in detail. The result is, the decree of the chancellor must

be reversed, the injunction dissolved, and the bill dismissed at the cost of the appellee in this court and in the court of chancery.

Reversed and rendered.

For further discussion of this topic see *Freem. Ex. § 348* and cases cited; also *Overton Bridge Co. v. Means*, 33 Neb. 857, 29 Am. St. 514, 51 N. W. 240, in which a sale on execution of the company's toll bridge over Platte river and its operating franchise to pay a judgment against it for the builder's claim, was enjoined.

BATES v. CHICAGO, MILWAUKEE & ST. PAUL RY. CO.

60 Wisconsin 296, 19 N. W. 72, 50 Am. Rep. 369. (1884)

Garnishment of Ry. Co. for Hogs In Transitu—Service on One Agent, Property in Possession of Another, Constructive Notice, Delivery, Diligence, Liability—Exemption from Garnishment, Why, Decisions Reviewed—Garnishee Chargeable for Property Held out of State, Why—Liability as Custodian for Property not Subject to Seizure.

Garnishment by Alphonzo C. Bates against the Chicago, Milwaukee & St. Paul Railway Co. as garnishee of the principal defendant, P. H. Cunningham. From judgment for the plaintiff, the garnishee appeals. Reversed.

On the trial of the issue, formed on the garnishee's answer denying liability, it appeared that when the garnishment summons was served at Milwaukee, Wis., at 5 a. m., the garnishee was in possession of a carload of hogs belonging to defendant, which were in transit to the Chicago stock yards, where they arrived and were delivered to the consignee at 7:20 a. m. the same day. The plaintiff claimed the garnishee was liable on these facts.

Fuller & Fuller and H. H. Field, for appellant.

Robert F. Pettibone, for respondent.

The Court by Taylor, J. After a careful consideration of the facts, and the arguments of the learned counsel for the respective parties, we have concluded that the learned circuit judge erred in refusing to instruct the jury as requested by the appellant, [*300] and also in rendering judgment in favor of the respondent upon the special verdict.

1. It seems to us very plain that where the law authorizes the service of a garnishee summons upon an officer of a corporation who has not in his actual possession the property sought to be reached by such process, but such property is in the possession of

some other officer or employee of the company, and such other officer or employee delivers such property to a person authorized to receive the same, before he can, with reasonable diligence on the part of the officer served, be notified to retain the possession thereof, such service is not sufficient to charge the corporation as garnishee. Nor do we think the officer served is under obligation to use extraordinary diligence in notifying the officer or other employee in charge of the property of the service of the process. He is bound to use reasonable diligence in respect to the matter, and if by the use of reasonable diligence notice cannot be given to the person in the actual possession of the property before it has lawfully passed from the possession of the corporation, the corporation cannot be held liable as garnishee in respect to such property.

In this case the garnishee summons was served at an unusual time, five o'clock in the morning, on the 2d of March, at a time when the officer was probably in his bed, upon an officer who, as the evidence shows, had no knowledge of the fact that the company had any property of the defendant in its possession, and whose business did not require him to have any knowledge upon that subject; and, so far as the evidence in this case shows, he had at hand no ready means of ascertaining the fact that it had any property of defendant in its possession; and within two and one half hours of the service of the process upon such officer of the company the property sought to be reached by the proceeding was without notice delivered to the person entitled to receive the same under the contract by which the company held possession [*301] of it when the summons was served, at a place nearly a hundred miles from the place where the officer was served with the summons. We think that, as a question of law, the service was insufficient to charge the company as garnishee.

We think the rule applicable to the notice which must be given by the vendor to stop goods *in transitu*, should apply to a case of this kind. The rule applicable to such cases is well stated by PARKE, B., in *Whitehead v. Anderson*, 9 Mees. & W., 534. He says: "If notice be given to the principal whose servant has the actual possession of the goods, it must be given at such a time and under such circumstances that the principal, by the exercise of

reasonable diligence, may communicate it to his servant in time to prevent the delivery to the consignee; and to hold that a notice to a principal at a distance is sufficient to revest the property in the unpaid vendor, and render the principal liable in trover for a subsequent delivery by his servant to the vendee, when it was impossible, from the distance and want of means of communication, to prevent that delivery; would be the height of injustice. The only duty that can be imposed on the absent principal is to use reasonable diligence to prevent the delivery." It seems to us that it would be the height of injustice to hold the railroad company liable as garnishee for goods which their servants and employees have delivered to the consignees entitled to receive them, having no notice at the time of making such delivery that any garnishee process had been served, and before a reasonable time had elapsed, after the service upon a distant officer of the corporation, within which notice could have been given to stop such delivery. To hold the company liable in such case would do violence to the statute which directs that "the court shall render such judgment in all cases as shall be just to all the parties, and properly protect their respective interests," etc. R. S., § 2766. The rule above stated was held applicable [*302] to the garnishee process by the supreme court of Massachusetts in *Spooner v. Rowland*, 4 Allen, 485. In this case it was held that the service of the process on the secretary of an insurance company in Boston, to attach money due on an insurance policy, was insufficient, when it appeared that three hours after the service the agent of the company paid the loss at Worcester to the claimant, without actual notice of the process.

2. Notwithstanding the general language of our statute upon the subject of garnishment, that "any creditor shall be entitled to proceed by garnishment, in the circuit court of the proper county, against any person (except a municipal corporation) who shall be indebted to, or have any property whatever, real or personal, in his possession, or under his control, belonging to such creditor's debtor, in the cases, upon the conditions, and in the manner prescribed in this chapter" (R. S. § 2752),—we feel constrained to hold that the personal property or real estate in his possession or under his control must be limited to personal property or real

estate within this state, and that in the absence of any fraud or connivance on the part of the garnishee to aid the debtor in defrauding his creditors, personal property or real estate which is lawfully in the possession or under the control of the garnishee outside of this state is not the subject of garnishment under our statute. That personal chattels outside of the state, which, if within the state could be seized by attachment or execution, were not intended to be covered by the statute, is, we think, evident.

The attachment of the debtor's property before judgment has always been considered a harsh remedy in this state, but that writ can only reach the property of the debtor within the state. R. S., § 2738. The garnishee process is in the nature of an attachment, and was first used to attach the credits of the debtor and apply them to the payment of his debts, but it has been extended in this state so [*303] as to attach, without actual seizure, the personal property and real estate of the debtor in the possession or under the control of third persons, so as to apply such property to the payment of his debts. We do not feel called upon to give this statute, which is in its nature a harsh remedy, a construction which would give the courts under it the highest powers of a court of chancery, viz., the power to compel a debtor to surrender his property held within a foreign jurisdiction, to be applied to the payment of his debts within this state. If under this statute the circuit court can exercise this power, then any justice of the peace may, for the same language is used in the statute which gives the power to justices' courts over the garnishee process that is used with respect to circuit courts, except that it leaves out the words "or real estate." As to personal property the language is the same. R. S., § 3716.

The statutes of this state, considered together and as one system, clearly indicate that the personal property which may be arrested in the hands of a garnishee must be within the state, so that it may be seized and sold to satisfy any judgment obtained against the principal debtor. Sec. 2762, R. S., relating to the proceedings in the circuit court, says: "If the answer disclose any money, credits or other property, real or personal, in the possession or under the control of the garnishee, the officer having a writ

of attachment or an execution, if any, may levy upon the interest of the defendant in the same; otherwise the garnishee shall hold the same until the order of the court thereon." The last clause of the section evidently relates to the cases where the garnishee is summoned in an action not commenced by attachment, and in such cases he must hold the property to await the judgment of the court in the principal action. The act giving jurisdiction of the proceedings to justices of the peace, provides as follows: "The justice shall enter an order in his docket, requiring the garnishee, within ten days, to [*304] pay or deliver to the justice such property, or the amount of such indebtedness, or so much thereof as may be necessary to satisfy such judgment; * * * and all property and effects, except money delivered to the justice, shall be by him ordered to be sold on the execution against the defendant." R. S., § 3725.

These provisions clearly indicate that the personal property to be reached in the hands of a garnishee is such as would be subject to seizure by the writ of attachment or execution, if they were in the possession of the principal debtor. It is unnecessary to intimate the difficulties and hardships which would result from the enforcement of a rule against garnishees compelling them to deliver up to the processes of the courts of this state any property they may have under their control, belonging to the principal debtor, situated in another state. The difficulty in the case at bar might not be great, because the property, although in fact out of the state when the garnishee summons was served, was not as distant from the place where the court was held, which issued it, as it might have been within the state. But the rule, if established, must be general, so that if property just beyond the line of the state may be reached, then property in Maine, Louisiana, or California, or in any foreign country, may also be reached and held. The difficulties and injustice of enforcing such a rule are apparent. The only case cited by the learned counsel for the respondent in which any court has held that personal property out of the state, in which the garnishee process was issued, could be reached and held by it, is *Childs v. Digby*, 24 Pa. St., 23. That case was disapproved as bad law by the same court in *Penn. R.*

R. Co. v. Pennock, 51 Pa. St., 244. The position taken by us upon this question is approved by the Pennsylvania court in the case last cited, and also in the following cases: *Western R. R. v. Thornton*, 60 Ga., 300; *Sutherland v. Second Nat. Bank*, 78 Ky. 250; *Wheat v. P. C. & Ft. D. R. R. Co.*, [*305] 4 Kan. 370, 378; *I. C. R. R. Co. v. Cobb*, 48 Ill. 402; *Lawrence v. Smith*, 45 N. H. 533; *Tingley v. Bateman*, 10 Mass. 343, 346; *Clark v. Brewer*, 6 Gray (Mass.), 320; *Young v. Ross*, 31 N. H. (11 Foster), 201.

It is urged by the learned counsel for the respondent that the garnishee should be held for property in his control out of the state, because the court could enforce its order against the person of the garnishee, over whom it has jurisdiction, in like manner as a court of equity sometimes enforces a contract between the parties to the action to convey lands situated in another state. Our answer to that argument is, as stated above, that it is clear that the legislature did not intend to confer these high equity powers upon the courts having jurisdiction of the garnishee process. It is unnecessary, therefore, to discuss the question of the power of the legislature to confer upon the courts of this state the authority to appropriate the personal property or real estate of a debtor, situate in another state or foreign country, to the payment of his debts in this state.

3. Another question of very great importance to all common carriers, and especially to all railroad companies within this state, was very fully discussed by the learned counsel for the respective parties orally and in their briefs; and, although not absolutely necessary to a determination of this appeal, we deem it highly proper to consider it in this case. The exact question is this: Can a common carrier be held liable, upon a garnishee summons, for personal chattels in his possession in actual transit at the time the summons is served?

We think that public policy, and the proper discharge of the duties imposed upon common carriers of personal chattels placed in their possession for carriage, requires that this question should be answered in the negative; and we think so, notwithstanding the very broad language of the statute above quoted. That railroad corporations, as well [*306] as individuals and other corporations,

are subject to the garnishee process must be admitted, and that in proper cases they must be held to respond as individuals. This court has so held as to debts due from the railroad company to the principal debtor in the action. The nature of the possession and control which the railroad company has of and over personal property in actual transit; the interruption of business, and the general inconvenience which must necessarily result from holding such property the subject of the garnishee process,—it appears to us are amply sufficient to justify us in making such property an exception to the general rule, in the absence of any positive declaration of the legislature subjecting such property to the process. Notwithstanding the general language used in statutes of this kind, the courts have established many exceptions, depending upon the nature and character of the possession and control which the person or corporation proceeded against has over the property in his or its possession. This court has established many exceptions, where it is admitted the language of the statute was broad enough to include the corporations or officers excepted by the courts. *Burnham v. Fond du Lac*, 15 Wis. 193; *Hill v. La. C. & M. R. R. Co.*, 14 Wis. 291; *Buffham v. Racine*, 26 Wis. 449; *Merrell v. Campbell*, 49 Wis. 535. So this court, as well as others, has made exceptions, and taken cases out of the general words of the statute on account of the nature of the indebtedness of the garnishee which is sought to be reached by the garnishee process. Thus, where the debt sought to be reached is in the form of a negotiable promissory note or bill of exchange, the debtor is not held chargeable as garnishee except under a showing of facts which will clearly protect him against the actual holder of the note or bill. *Carson v. Allen*, 2 Pin. (Wis.), 457; *Davis v. Pawlette*, 3 Wis. 300; *Mason v. Noonan*, 7 Wis. 609; *State ex rel. Rogers v. Burton*, 11 Wis. 50; *Beck v. Cole*, 16 Wis. 95. These cases are abundant to [*307] show that where the public good requires it, or when it is necessary to protect the rights of the garnishee, the courts have not hesitated to say that the general words of the statute should be construed not to include the party or the particular subject matter of the controversy. * * * [*308]

* * * We think when the legislature gave the garnishee proc-

ess in an ordinary action upon contract before judgment, and where there is no allegation of any fraudulent attempt on the part of the debtor to defraud his creditors, it could not have contemplated that it would be used for the purpose of interfering with the business of railroads and other common carriers in the prompt performance of their duties to the public; and when the plaintiff, upon allegations of fraud, proceeds by writ of attachment against the property of his debtor, he should take the risk of the actual seizure of the defendant's property if found in the hands of the carrier, and assume the risk as well as the expense of establishing the ownership of the property by the defendant, and not be allowed to cast that risk and expense upon the carrier by summoning him as garnishee.

There are but few decisions of the courts upon this subject. We have been referred by the learned counsel for the respondent to the case of *Adams v. Scott*, 104 Mass. 164, as sustaining the right to hold, by garnishee process, goods in the hands of a common carrier while *in transitu*. It must be admitted that the court so held in that case. It was a very plain case. There was no dispute about the ownership of the property, and the property at the time of the service seems to have been not in actual transit, but in the hands of an agent of the company in the city of Boston. Still it is quite plain that the court held that the fact that the property was in the hands of a common carrier in transit, was no objection to the proceedings. This is the only [*309] case we have found which sustains the doctrine contended for by the respondent. On the other side, the learned counsel for the appellant have cited us the cases of *I. C. R. R. Co. v. Cobb*, 48 Ill. 402, and *M. C. R. R. Co. v. C. & M. L. S. R. R. Co.*, 1 Ill. App. (1 Bradw.) 399, which sustain the contrary doctrine, and hold that chattels in the hands of a common carrier *in transitu*, are not the subject of garnishment. The doctrine of these cases has some support in the cases of *Penn. R. R. Co. v. Pennock*, 51 Pa. St. 244, 254, and *Western R. R. Co. v. Thornton*, 60 Ga. 300. We approve what was said by Chief Justice Breese in the case of *I. C. R. R. Co. v. Cobb*, *supra*, about the injustice of holding the common carrier as garnishee in respect to property in actual transit, viz.: "They are

obliged, under ordinary circumstances, to carry all that shall be delivered to them, and they discharge their duty by carrying and delivering according to the contract. It is not their business, nor is it their interest, to know to whom the various articles belong, nor should it be required of them that conflicting claims to the property intrusted to them should be adjusted through controversies in which they have no interest, and the burden, annoyance, and expense of which they must bear. When the goods are in the depot of a railway company in the county in which the attachment proceedings are instituted, there could, perhaps, be no objection to such process; but on this point we express no definite opinion. When the property has left the county, and is in transit to a distant point, though on the same line of railway, it would be unreasonable to subject the company to the costs, vexation, and trouble of such process, merely because it had received to be carried that which the law compelled it to receive and carry."

Whether goods in a depot of a railway company in this state, either before transit or after, and awaiting delivery [*310] after their arrival at the place of delivery, would be subject to the garnishee process, we do not determine.

For the reasons stated, the judgment of the circuit court must be reversed.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded with instructions to that court to enter a judgment upon the special verdict in favor of the garnishee defendant.

For further decisions on garnishments against quasi public corporations see Rood, Garnish., § 37.

KLEIN v. NEW ORLEANS.

99 United States 149. (1878)

Execution on Judgment against a City—What Property Liable, Why—Objection, How Made.

John Klein, having procured execution on a judgment for \$89,000 recovered by him against the city of New Orleans, a rule on the plaintiff to show cause why the levy upon certain lands thereunder should not be set aside, was made on motion of the

city. On the hearing, the rule to dissolve the seizure was made absolute, and Klein thereupon brought the case here. Affirmed.

J. Q. A. Fellows, for the plaintiff in error.

B. F. Jonas, *contra*.

The Court by Waite, C. J. We must take the facts of this case as they are stated in the bill of exceptions, and cannot look into the evidence. The questions to be settled are: 1. Whether the lands levied on are subject to seizure and sale under execution against the city; and, 2. Whether the ground rents are liable in the same way.

This depends on the facts. If the lands are held by the corporation for public purposes, and the ground rents are part of the public revenues, it is well settled that they cannot be levied on or sold. *Dillon, Mun. Corp.*, §§ 64, 446. Municipal corporations are the local agencies of the government creating them, and their powers are such as belong to sovereignty. Property and revenue necessary for the exercise of these powers become part of the machinery of government, and to permit a creditor to seize and sell them to collect his debt would be to permit him in some degree to destroy the government itself.

The bill of exceptions shows that the lands consisted of "two squares of ground which had formerly constituted the easterly bank of the Mississippi River, but which, by the gradual accretion of said easterly bank, had ceased to constitute the bank of the river, but which were now used by the public for wharf and levee purposes, said squares forming a portion of the land known as the 'Batture property.'" From this it must be [*151] inferred that they were held for the use of the public. In a city where business is carried on by water, a public wharf is as much a public necessity as a public street or highway. If the land in this case had still continued to be the bank of the river, and used and improved as a public landing, it certainly could not have been subject to sale on execution against the city; but we think a simple extension of its surface does not change its character. If it continues to be used as it was before, it is still public wharf or levee property. It matters not that charges may have been made by the city for wharfage. That would be nothing more than a proper govern-

mental regulation. A street extending to navigable waters and used for wharf purposes does not cease to be public property because a charge is made for its use in that way. The test in such cases is as to the necessity of the property for the due exercise of the functions of the municipality. Upon the facts as stated by the court below, we think the lands levied upon were not subject to seizure and sale.

As to the ground rents, it was decided by the supreme court of Louisiana, in *New Orleans & Carrollton Railroad Co. v. Municipality No. 1* (7 La. Ann. 148), that "in authorizing the mayor and city council (of New Orleans) to sell property on perpetual ground rent, the legislature established a legal destination of the rents, as a portion of the public revenue of the city, to enable the municipal authority to exercise its powers of police and government. These rents, therefore, cannot be sold under execution against the municipality." There is nothing in the bill of exceptions to show that the rents levied upon in this case were in any respect different from those under consideration in that. We must presume, therefore, that they are the same.

Judgment affirmed.

See also the following cases for a fuller discussion of these principles: *New Orleans v. Louisiana Construction Co.*, 140 U. S. 654; *Darlington v. New York*, 31 N. Y. 164, 88 Am. Dec. 248; *Leonard v. Brooklyn*, 71 N. Y. 498, 27 Am. Rep. 80.

"We think that all property held by the city authorities for the public use, health and enjoyment of the people of the city, is not so liable to levy and sale. Further, we are of the opinion that all property of every kind held by the municipality is presumptively for the public use, and whilst perhaps the presumption may be overcome, on proof that the corporation is holding it for other purposes, * * * yet the onus would be upon the plaintiff in execution to make that proof." *Curry v. The Mayor and Aldermen of Savannah*, 64 Ga. 290, 37 Am. Rep. 74.

In Ill. and perhaps some other states no property of a municipal corporation can be sold under judicial process, irrespective of the purpose for which it is used. *City of Chicago v. Hasley*, 25 Ill. 485.

Mandamus is the proper remedy to compel payment of judgments against municipalities. See *Dillon on Mun. Corp.* 1890 Ed. § 851.

WATERBURY v. BOARD OF COMMISSIONERS.

10 Montana 515, 24 Am. St. 67, 26 Pac. 1002. (1891)

Garnishment against County—Terms of Statute—Exemption, Reasons Pro and Con, Decisions Reviewed—Klein v. New Orleans Distinguished.

Action by Waterbury against Harnon, in which the Board of Commissioners of Deer Lodge County was summoned as garnishee. From a judgment discharging the garnishee, Waterbury appeals. Reversed.

Under the Mont. Ter. Code Civ. Proc. § 189, "All persons" summoned as garnishees are liable for defendant's property in their possession and any debts they owe him; and by General Laws § 202, "The word 'person' may extend and be applied to bodies politic and corporate." By Gen. Laws, § 744, "each organized county of this state shall be a body politic and corporate."

G. B. Winston, for appellant.

Henry J. Haskell, Attorney-General, and *W. S. Shaw*, County Attorney, for respondent.

The Court by De Witt, J. This action arose while this commonwealth was a territory of the United States, and the laws applicable to the contention are set forth in the introductory statement.

The garnishment of towns, cities, and counties has been the subject of such conflicting views in different states, and being a first impression in this court, we incline to adopt the language of Judge Welch in *City of Newark v. Funk*, 15 Ohio St. 463: "In other states authorities are quite conflicting; so much so that we do not feel bound by any of them, and see nothing to prevent us from deciding the question as an original one, according to our own views of public policy and the meaning and intent of the statute."

This conflict to some extent, but by no means wholly, dissolves, upon an inspection of the statutes upon which the decisions are made. In 2 Wade on Attachments, §§ 345 and 419, are marshaled the states holding diverse views, and the author concludes that the majority is against holding municipal corporations as garnishees. But the author doubts the soundness, and questions the

reason of the rule. There is eminently respectable opinion upon the other side of the question.

An analysis of the case would be interesting, but we will not enter upon it, by reason of the direct conflict of the decisions, even upon similar statutes; and, furthermore, we are of opinion that the statutes of this state are so much more explicit upon the subject under consideration, that many of the decisions of sister states are inapplicable; and that, in view of our statute, [*520] the weight of authority is not against the liability of a county as a garnishee.

It is not doubted that the statute may exempt a county from the process of garnishment. Our statute does not so exempt a county; and, if they are to be exempted, the authority must be found elsewhere than in the express declaration of the statute. Again, the statute may subject a county to this process. Now what do we find written in the law? It declares that "all persons" having in their possession or under their control any credits or other personal property belonging to the defendant, or owing debts to him, etc., shall be liable to the process. Furthermore, that the word "person" may be applied to "bodies politic and corporate," and that counties are "bodies politic and corporate." Hence counties, as "bodies politic and corporate," are brought within the meaning of the word "persons," and all persons may be garnished. It is therefore no strained conclusion to say that a county is subject to the process.

Speaking of holding a county as garnishee, Judge Biddle (*Wallace v. Lawyer*, 54 Ind. 506; 23 Am. Rep. 661) says: "And the decisions are generally made upon statutes authorizing corporations, in terms, to be garnished; yet the courts hold that the general word 'corporation' must be restricted to mean private or ordinary business corporations, and not extended to embrace municipal corporations, or bodies politic and corporate. The words used in the statute of this state are 'persons' or 'corporations,' in general terms." But the statute of Montana, as above noticed, goes further than to use the words "persons" or "corporations" in general terms, as in Indiana, and the remarks of the judge in that

case, and the authorities to which he refers, lose their force in this court.

It is a general principle that one who may be sued may be garnished by the creditor of the person who may sue. Counties with us may be sued (§ 744, Gen. Laws), and, therefore, under the general rule, they would be subject to garnishment. They, in this respect, do not come within the reason of exempting a sovereign state from garnishment, which sovereignty may not be sued, or ordinarily subjected to process of the courts. It being clear that the statute does not expressly exempt counties from garnishment, and it being equally clear that the letter of [*521] the statute is such that it can be reasonably applied to a county as a subject of garnishment, is there anything in the spirit of the law or the doctrine of public policy which prohibits such a construction?

We will examine, in the light of the statute, the reasons adduced for exempting counties from this process of the courts. It is objected that there is practical difficulty in summoning an artificial entity, like a county, to be examined on oath respecting its possession of property of the debtor, as provided in § 190 of the Code of Civil Procedure, and that so summoning its officers is a serious interruption to the business of the county and its officers.

We cannot agree with this view. The statute (§ 749, Gen. Laws) expressly provides a method for service of process against a county in all legal proceedings. In another portion of the statute (§ 72) service of a summons upon a county is provided for. Answering a garnishment is by no means as large an affair as appearing in an action as a defendant. The statute providing a method for summoning a county in legal proceedings, we can see no practical difficulty in its appearing. There was certainly none in this case, and no derangement of the county's business occurred. Again, it is said that the writ does not lie against a county by reason of its being contrary to public policy; that disasters to the public would ensue if the writ were allowed, and public servants would be impaired in their usefulness. In *Wallace v. Lawyer, supra*, it was held that a county cannot be held to answer as to its indebtedness to an execution debtor for his salary as an officer of

such county in proceedings supplemental to execution. This case cites with approval *Merwin v. City of Chicago*, 45 Ill. 133, 92 Am. Dec. 204, which was a case of garnishment of a municipal corporation, in which the court, by Lawrence, J., says: "The only question presented by this record is, whether municipal corporations in this state are liable to the process of garnishment. This court held, in *City of Chicago v. Hasley*, 25 Ill. 485, that the property of such a corporation could not be levied on and sold under execution. This decision was placed upon the grounds of public policy. However strong the obligation of a town or city to pay its debts, it was considered that to [*522] allow payment to be enforced by execution would so far impair the usefulness and power of the corporation in the discharge of its governmental functions, that the public good required the denial of such a right. * * * Although this decision is not conclusive upon the question before us as *res adjudicata*, yet the entire spirit and reasoning upon which it is based must lead us to hold that a municipal corporation is not liable to process of garnishment. The question has been often before the American courts, and although the decisions are not uniform, in a large majority of the cases it has been held that the writ would not lie. The reason given for these decisions is uniformly the same, and is substantially that given by this court in the case in 25th Ill. It must be decided as a question of public policy. These municipal corporations are in the exercise of governmental powers to a very large extent. They control pecuniary interests of great magnitude, and vast numbers of human beings who are more dependent on the municipal, for the security of life and property, than they are on either the state or federal government. To permit the great public duties of this corporation to be imperfectly performed, in order that individuals may the better collect their private debts, would be to pervert the great objects of its creation."—

Thus it is observed that the 45 Ill. 133, on the subject of garnishment of a municipal corporation, adopts the reasoning of 25 Ill. 485, in the matter of an execution against the corporation, on a judgment obtained directly against the corporation. The grounds for denying an *execution* against a municipal corporation

are most satisfactorily put in 25 Ill., *City of Chicago v. Hasley*. The court well points out the disasters which might follow the levy of *execution* against the city of Chicago; how the seizure of the water-works would precipitate a water famine, the levy upon fire-engines would expose to the horrors of conflagration, and the seizure of revenues would paralyze government. To these views we have no dissent. But we cannot follow the Illinois court in 45 Ill., when it applies these arguments to the matter of *garnishment* of the municipal corporation. By garnishment the water-works, fire-engines, public buildings, and revenues of the corporation are not seized. The corporation is simply required to hold, and finally pay over, a sum of money [*523] or property, in which it has no interest, to one person rather than another. Its business is not interrupted; its property is not touched; its functions are not deranged.

Returning to the case at bar, we cannot agree that there is any reason why the great public duties of a county need be imperfectly performed, or that its business is in any danger of derangement, if it be compelled, by process of a court, to pay the salary of a servant to that servant's creditors. The county has no suit to defend, no counsel to employ, no witnesses to collect and pay. It has no burden cast upon it, no duty to perform, except to act as temporary stakeholder, to await the determination of a court, in an action in which the county has no interest.

The argument of public policy as to inconvenience to the county and its officers does not reach our mind with sufficient force to impair another view of law and of right that is recognized throughout the civilized world; that is, that debtors should pay their debts. This, of course, with the modification that the means of livelihood should be left to the debtor, which view is embodied in the laws of exemption from execution, which in this state are very liberal. The debtor's earnings for thirty days prior to the levy of a writ are exempt from seizure. The servant of the county is thus secured in his support, if he earns it, and the county is not liable to lose the services of competent officers. Indeed, it has never been observed that a county has difficulty in obtaining employees to do its work, and the county may surely obtain as good

service from those who pay their debts as from those who avoid such payment, and are protected in the avoidance by the unsatisfying doctrine of public policy.

We conclude that there is no substantial argument from public policy which requires us to read the law as to garnishment of counties differently from what its letter seems to us to declare. Counties are not exempted from garnishment by statute. On the contrary, their liability to the process is within the letter of the law. We find nothing in the spirit or the doctrine of public policy which induces us to add to or take from the letter. The judgment of the district court is reversed, and the cause is remanded, with directions to that court to enter judgment in favor of the plaintiff for \$210.40, and interest at the rate of ten per cent per annum from the twelfth day of March, 1888, and for the costs of this appeal.

Reversed.

I believe the above case gives the best discussion of both sides of this vexed question of any reported, but that the majority of the decisions are against the view taken above. However, they are quite evenly divided. I have collected the authorities in Rood, Garnish. §§ 18-24. In Michigan a school district which attempted to waive the privilege was obliged to pay again. *School Dist. No. 4 of Marathon v. Gage*, 39 Mich. 484, 33 Am. Rep. 421. Contra, *Skelly v. Westminster School Dist.*, 103 Cal. 652, 37 Pac. 643.

CARTER v. STATE.

42 Louisiana An. 927, 21 Am. St. 404, 8 South. 836. (1890)

Right to Sue State, Permission, Right to Execution on Judgment—Constitutional Law, Division of Governmental Functions, Delegation of Powers.

Land & Land and A. H. Leonard, for plaintiff and appellant.

J. Henry Shepherd, district attorney, for defendant and appellee.

The Court by Fenner, J. By an act of the general assembly, No. 81 of 1884, plaintiff was authorized to sue the state of Louisiana for a certain indebtedness alleged to be due under a contract with the state. In accordance therewith he brought his suit and recovered a judgment against the state in March, 1885, which became final without appeal. He alleges that at the session of the general assembly in 1886 and at the subsequent session in 1888 he applied for an appropriation to satisfy his said judgment by

bills for that purpose introduced by members, which said bills were defeated, and that his only remedy for the enforcement of his rights under said judgment is by the exercise of the judicial power.

He avers that the state owns property, rights and credits, which form no part of its annual révenues, derived from taxation for the support of the government, and which are not exempt from seizure and sale, and that he has the right to execute his judgment by seizure and sale thereof under the usual process.

He prays, therefore, that the state be cited through her governor and that, after due proceedings, there be judgment decreeing that a writ of execution or *feri facias* issue on said judgment against the state commanding the seizure and sale of any of her property not forming part of her annual revenues derived from taxation, to an amount sufficient to pay and satisfy said judgment.

The state appeared by counsel and filed an exception of no cause of action, and from a judgment sustaining said exception the plaintiff brings the present appeal.

The learned counsel of plaintiff fully and frankly concedes the principle, now fortunately too firmly established by repeated judicial decisions to admit of further controversy, that a state of this union can not, directly or indirectly, be sued by its own citizens, or by the citizens of other states or of foreign nations, either in its own courts or in the federal courts, without its consent. His contention, as we understand it, is that the state, in this case, has consented to be sued, and that the effect of such consent is to subject the state [*931] to the judicial power and jurisdiction, not only for the purpose of entertaining, hearing and deciding the suit, but also for the purpose of executing and enforcing the judgment by the seizure and sale of the property of the state and by applying the proceeds to the satisfaction thereof. Our answer to this contention is twofold, viz.: * * *

1. Legislative acts authorizing individuals to sue the state upon claims which the legislature, for any cause, does not see fit to recognize and pay, have been of common occurrence in this and in other states. Their purpose and effect, as commonly understood, are undoubtedly nothing more than to refer to the judiciary the settlement of the questions of law and fact involved in the

claims, and the determination, in the form of a judgment, of the rights of the parties. It is implied, as a matter of course, that the legislative power, after making such a reference, will accept and abide by the judicial determination, will recognize the judgment rendered as final and conclusive, and will, in due and ordinary course, make provision for the satisfaction thereof. That such was the interpretation of his remedy adopted by the plaintiff himself is evinced by his application to successive general assemblies for an appropriation to satisfy his judgment.

But to assume that, by consenting to be sued, the legislature intended to abdicate its constitutional function of controlling and administering the public funds and property and of appropriating them to such lawful purposes as it may deem best, and to delegate to the judicial department the power of seizing such property and applying it to the payment of a particular debt, would be, beyond measure, rash and unjustifiable. No such intention is expressed in the act or can be fairly implied from its terms; and we consider it beyond question that no such ever entered into the mind of any member of the legislative body. The incidents and appurtenances of ordinary jurisdiction have no application to a case like this. Undoubtedly jurisdiction [*932] granted to render judgments between parties subject to judicial power and control implies power to execute such judgments. But the sovereign is not subject to judicial power and control, except just so far as it has consented thereto; the moment the limit of that consent is reached the judiciary must instantly halt. Satisfied as we are that the legislature has not consented and did not intend to consent to the execution of this judgment by writ of *fiery facias*, we are bound to deny such remedy.

Counsel asks, of what use is the power to render judgment against the state, if the court is powerless to execute the judgment? That question was anticipated by Mr. Hamilton in the discussion of the constitution of the United States before its final adoption. "To what purpose," he asked, "would it be to authorize suits against sovereign states for the debts they owe? How could recoveries be enforced? It is evident that it could not be done without waging war against the contracting state." Federalist

No. 81. He never dreamed that authorizing suit against a state would imply the right to issue *fieri facias* on the judgment.

Puffendorff says: "And if the prince gives the subject leave to enter an action against him in his own courts, the action itself proceeds rather upon natural equity than on municipal laws. For the end of the action is not to *compel* the prince to observe the contract, but to *persuade* him." In England claims against the crown might be prosecuted before certain courts in the form of petitions of right, with the consent of the king, but it was held by Lord Mansfield that "if there were a recovery against the crown, application must be made to Parliament, and it would come under the head of supplies for the year." *Macbeth v. Haldimand*, 1 Durn. & East, 172.

We have examined all the authorities quoted by counsel and find none of them to support his contention. We are quite certain that no precedent exists sustaining the issuance of a *fi. fa.* on a judgment against a sovereign state in her own courts, though rendered with her own consent. The only recourse for satisfaction is by application to the legislature, with whom the judgment should surely have great *persuasive* force, but none *compulsive*. [*933]

2. We are quite satisfied that, if the legislature had expressly authorized the court to execute this judgment by the issuance of the writ of *fi. fa.*, and the seizure and the sale of the property of the state for its satisfaction, such action would have been unconstitutional, null and void. Articles 14 and 15 of the constitution divide the powers of government into three distinct departments, and provide that "no one of these departments, nor any person or collection of persons holding office in any one of them, shall exercise power properly belonging to either of the others."

The fiscal affairs of the state, the possession, control, administration and disposition of the property, funds and revenues of the state are matters appertaining exclusively to the legislative department. Except in so far as the constitution itself has appropriated them to particular purposes, the legislative department has exclusive control of them. No debt of the state can be paid without an appropriation, and the constitution provides the manner in

which alone appropriations shall be made. The judicial department is vested with no right or authority over such matters directly or indirectly. If the legislature, in authorizing the judiciary to entertain suits and render judgments against the state, should add the authority to execute the same by seizure and sale of the state's property and the application thereof to the payment of the debt recognized by the judgment, it would be delegating to the judicial department powers exclusively vested in the legislative department, in violation of the express prohibition of the constitution. The giving to the exercise of such powers the form of judicial process would not destroy its essential character. It would still be in effect the exercise of the purely legislative power of disposing of and appropriating the property and funds of the state to the payment of a particular debt of the state. Such powers the judiciary and all members thereof are prohibited from exercising, with or without the legislative consent.

If the legislature could delegate such power in one instance, it might refer all public creditors to the courts for satisfaction, and shoulder on the judiciary the whole burden of distributing the state's property and funds amongst them in a *concursus*. We will not further elaborate the subject.

Judgment affirmed.

BUCHANAN v. ALEXANDER.

45 United States (4 Howard) 20. (1846)

Garnishment against United States—Ignoring Government and Proceeding against Officer—Delivery to Agent with Direction to Pay, Title to Money, Liability to Process against Payee.

Attachment by James Alexander against McKean Buchanan, purser of the frigate Constitution, as garnishee of a seaman thereon, who owed the plaintiff for board. From a judgment against the garnishee, he brings error. Reversed.

The Court by McLean, J. * * * The important question is, whether the money in the hands of the purser, though due to the seamen for wages, was attachable. A purser, it would seem, cannot, in this respect, be distinguished from any other disbursing agent of the government. If the creditors of these seamen may, by process of attachment, divert the public money from its legiti-

mate and appropriate object, the same thing may be done as regards the pay of our officers and men of the army and of the navy; and also in every other case where the public funds may be placed in the hands of an agent for disbursement. To state such a principle is to refute it. No government can sanction it. At all times it would be found embarrassing, and under some circumstances it might be fatal to the public service.

The funds of the government are specifically appropriated to certain national objects, and if such appropriations may be diverted and defeated by state process or otherwise, the functions of the government may be suspended. So long as money remains in the [*21] hands of a disbursing officer, it is as much the money of the United States as if it had not been drawn from the treasury. Until paid over by the agent of the government to the person entitled to it, the fund cannot, in any legal sense, be considered a part of his effects. The purser is not the debtor of the seamen.

It is not doubted that cases may have arisen in which the government, as a matter of policy or accommodation, may have aided a creditor of one who received money for public services; but this cannot have been under any supposed legal liability, as no such liability attaches to the government, or to its disbursing officers.

We think the question in this case is clear of doubt, and requires no further illustration. The judgments are reversed at the costs of the defendants, and the causes are remanded to the state court, with instructions to dismiss the attachments at the costs of the appellees in that court.

Reversed.

7. WHAT COURTS MAY ISSUE THE WRITS.

Under this head prepare again on: *Dillon v. Burnham*, ante, 228; *Roberts v. Connellee*, ante, 78; and the cases under the head of jurisdiction, especially,—*Hoagland v. Creed*, ante, 13; and *Cooper v. Reynolds*, ante, 15.

CLARKE v. MILLER.

18 Barbour Sup. (New York) 269 (1854)

**Sheriff's Deed, Validity—Proof of Judgment and Execution—Effect of
Invalid Execution—Power to Cure Defect by Amendment.**

This decision was rendered in the sixth judicial circuit of supreme court of New York at the Delaware general term in July; Crippen, Shankland and Mason, JJ.

Ejectment by Miller against Clarke. From judgment for plaintiff at a special term defendant appeals. Reversed.

Dana & Beers, for appellant.

Ferris & Cushing, for appellee.

The Court by Mason, J. This is an action of ejectment, and the plaintiff made his title through a judgment, execution and sheriff's deed. The judgment was recovered on the 7th day of May, 1846, in the court of common pleas of Tompkins county, in favor of the Tompkins County Bank, against Andrew W. Knapp and Birdsey Clarke, for \$116.23. In July, 1849, an execution was issued out of the supreme court, upon said judgment, to the sheriff of Tompkins, who sold the premises thereon; and the fifteen months having expired, the sheriff, on the 1st day of January, 1851, gave to the purchaser a deed, which recited that the execution issued out of the supreme court. After the commencement of the present action, the county court [*270] of Tompkins granted an order amending the execution, the sheriff's certificate of sale, and the sheriff's deed, so as to make the execution issue out of the county court of Tompkins, instead of the supreme court; and the sheriff, after his term of office had expired, in pursuance of said order, erased the words, supreme court, and inserted Tompkins county court, in the reciting part of said deed, and after the deed

had been delivered, and without any new acknowledgment thereof. These facts all appeared before the execution and sheriff's deed were offered in evidence; and when offered, the defendant's counsel objected to the execution and sheriff's deed, in consequence of such alterations. The judge at the circuit overruled the objection and admitted them in evidence, and held the title acquired by the purchaser under them to be good.

The judge at the circuit most clearly erred. A sheriff's sale of land is within the statute of frauds, and requires a deed, to pass the title to the purchaser. *Jackson v. Catlin*, 2 John. 248. And a sheriff's deed is not admissible in evidence, without showing the judgment and execution under which he sold. *Bowen v. Bell*, 20 John. 338. The sheriff's deed not being admissible, without producing the judgment and execution, I do not see upon what principle it could be admitted at all. The rule is a familiar one, that judgments must be executed in those courts in which they are rendered. 3 Bacon's Abr. 715, tit. Execution, E. I do not see upon what principle the supreme court could assume to execute this judgment, recovered in the common pleas. The supreme court possessed no power to award a *feri facias* upon that judgment, and every execution that is issued by the attorney is regarded in law as awarded by the court out of which it issues, just as much as if the award was made upon the record. It strikes me as a strange proceeding, for the supreme court to award an execution to the sheriff, commanding him to collect a judgment of the county court; and I entertain no doubt but such an execution is absolutely void. But what is more strange still, after the sheriff has executed it and sold the lands of the defendant and given a deed to the purchaser, the county court assume to say: "We will interfere with [*271] the process of the supreme court, because that court has undertaken to execute our judgment;" and so, by an order, the county court change, I suppose, an execution of the supreme court which has been fully executed and returned, into a process of the county court, and declare, in effect, that the child is theirs, although they had no hand in begetting it. The rule is a familiar one, that every court can amend its own process. It is said to be a power incidental to every court. It is no more than assuming

the power to correct its own proceedings; but I am not aware of any power in the county court to amend the process of the supreme court. This process, being void, is not amendable. *Bunn v. Thomas*, 2 John. 190; *Burk v. Barnard*, 4 Id. 309; *Miller v. Gregory*, 4 Cowen, 504; *Chandler v. Becknell*, Id. 49. In *Simon v. Gurney*, (1 Marsh. 237, 5 Taunton, 605, 1 Petersdorf's Abr. 595), where a *fiery facias* was issued upon a judgment in the common pleas, returnable in the king's bench, but the writ was tested in the name of the chief justice of the common pleas, the court allowed the writ to be amended, by making it returnable in the common pleas; placing their decision upon the express ground that, as the writ was tested in the name of the chief justice of the common pleas, there was something to amend by. The reason why void process cannot be amended is, there is nothing to amend by. All the cases hold the very sensible language, that, when there is nothing to amend by, the court have no power of amendment. In this case, the writ issuing out of the supreme court, and returnable in that court, there is nothing in the county court to amend by. The county court could not amend anything that has been done in that court towards the execution of their judgment, for nothing has been done in that court. The execution being void in the hands of the sheriff, all that was done under it is of no effect. As a consequence, the sheriff's certificate is a mere nullity, and so was his deed. * * * [*272] * * * I am of opinion that, for these reasons, without considering the other questions in the case, the judgment of the circuit court should be reversed and a new trial granted; costs to abide the event.

Reversed.

RAHM v. SOPER.

28 Kansas 529. (1882)

Process on Justice's Judgment after Transcript Docketed in Court of Record—Garnishment as a Defense to Action by Creditor.

Action commenced in justice court by Frank Rahm against R. B. Soper, his tenant, to recover rent. Soper defends on the ground that, after the rent accrued and before plaintiff purchased, Soper was summoned as garnishee of plaintiff's grantor, Eliz. H. Hook, on a judgment against her in favor of T. J. Stout. From

judgment for defendant by the district court on appeal, plaintiff brings error. Reversed.

Lucien Baker and Wm. C. Hook, for appellant.

Wm. Dill, for appellee.

The Court by Horton, C. J. The judgment of T. J. Stout against Elizabeth H. Hook was rendered before a justice of the peace of Leavenworth county in 1878, and in the same year an abstract of that judgment was docketed in the district court of Leavenworth county, under § 119 of the justices' act. The garnishment proceedings against R. B. Soper were commenced on March 21, 1881, before the justice rendering the judgment, and long subsequent to the docketing of the abstract in the district court. It was held in *Treptow v. Buse*, 10 Kas. 170, that the filing of an abstract in the district court has the same force as the filing of the transcript of a judgment. Comp. Laws of 1879, ch. 81, § 119; *id.*, ch. 80, § 518. The filing of an abstract of a judgment rendered before a justice of the peace obviously contemplates a transfer of the judgment from the justice's court; and after the judgment is so transferred to the district court, it becomes subject to the same rules and vested with the same powers as though originally rendered in that court. *Treptow v. Buse*, *supra*; Comp. Laws 1879, ch. 81, § 188. [*531]

Section 138 of the justices' act reads: "It shall be the duty of the justice, if the case be not appealed, taken up on error, docketed in the district court, or bail has not been given for the stay of execution, at the expiration of ten days from the entry of the judgment, to issue execution without a demand and proceed to collect the judgment, unless otherwise directed by the judgment creditor."

Within the express terms of this section, after a case has been docketed in the district court, it no longer becomes the duty of the justice to issue execution in the absence of a demand. As the docketing of the judgment in the district court transfers the judgment to that court, and as by such transfer it becomes subject to the same rules and vested with the same powers as though originally rendered in that court, the judgment creditor after such transfer must look to that court for the means of enforcing the collection of the judgment, and cannot demand execution under § 137

of the justices' act. This certainly was the intention of the legislature, and this construction of the statute renders the provisions of the code and the sections of the justices' act concerning this subject-matter harmonious. If a different view were entertained, a plaintiff would have the privilege of process on the same judgment from two courts within the same county at the same time. If the judgment creditor is not deprived of the right to an execution before the justice after he has transferred his judgment to the district court by filing an abstract, the provisions relating to revivor in § 522 of the code are without much significance, as the plaintiff might keep alive his judgment before the justice and from time to time file new abstracts. As in our view the justice after the filing of the abstract of the judgment in the district court had not jurisdiction to issue process in the case, all of the garnishment proceedings after the transfer of the judgment to the district court must be regarded as nullities. * * * [*532] * * *

The judgment of the district court must be reversed, and the case remanded with direction to the court below to enter judgment upon the agreed statement of facts for plaintiff in error.

Reversed.

Same effect: *Herdman v. Cann*, 2 Houston (Del.) 41; *Oberwarth v. McLean*, 52 How. Pr. (N.Y.) 491. Compare *Baker v. King*, 2 Gr. (Pa.) 254; *Brandt's App.*, 16 Pa. St. 343; *Nelson v. Guffey*, 131 Pa. St. 273, 289.

BOSTWICK v. BENEDICT.

4 South Dakota 414, 57 N. W. 78. (1893)

**Judgment of Court of Record—Transcript Docketed in Court of Another County—Execution from Latter Court—Regular,
Void or Voidable—Purpose of Statute.**

Taubman & Potter and *Little & Nunn*, for appellants.

R. B. Smithers and *John W. Bell*, for respondents.

The Court by Kellam, J. This is an appeal from an order of the circuit court of Grant county amercing appellant, as sheriff, for non-payment of moneys alleged to have been collected by him on execution. The facts are undisputed, and are as follows: In the circuit court of Roberts county, respondents Bostwick obtained a judgment against one Knight, and caused a transcript to be filed in the office of the clerk of the circuit court for Grant

county, and thereupon caused execution to be issued by the clerk of the circuit court of said Grant county to the sheriff of such county; that prior to the issuance of said execution one Dewees had obtained judgment in said Grant county circuit court against respondents Bostwick; that while said first execution was in the hands of the sheriff as aforesaid, and before the same was collected, he received, as such sheriff, for collection, an execution issued upon the judgment of Dewees against the respondents Bostwick. While so holding both executions, Knight, the defendant in the first, paid to the sheriff the amount due thereon, and directed him to apply the same on the judgment and execution of Dewees against respondents Bostwick; and he did so, paying the same over to the plaintiff, Dewees. Respondents Bostwick then made demand for the amount so recovered from Knight, and, payment being refused, brought these proceedings. * * * [*417]
* * *

Section 5104, Comp. Laws, provides that a transcript of the original docket of a judgment may be taken from the county in which the judgment was rendered, and filed in the office of the clerk of the circuit court of any other county, and that it shall then be a lien upon any real estate of the judgment debtor in said county, but this does not authorize the clerk of such county to issue execution thereon. Execution may be issued to the sheriff of any county where the judgment is docketed (§ 5114), but it must be issued from the county where the judgment was rendered. This is the evident plan of our statute. In some states the statute expressly authorizes an execution to issue from any county in which a transcript is filed, but ours does not, and the power does not exist without statutory authority. *Freem. Ex'ns*, § 14. The object of our statute in allowing the filing of a transcript in another county is, as stated in said § 5104, to make the judgment a lien upon the debtor's real estate in such county. It confers no authority upon the clerk of such county to issue such execution, and any attempt to do so is unauthorized, and the execution is void. It is so held in states having statutory provisions similar to ours. See *Seaton v. Hamilton*, 10 Iowa, 394; *Furman v. Dewell*, 35 Iowa, 170; *Shattuck v. Cox*, 97 Ind. 242. In this case

the execution issued by the clerk of the Grant county circuit court on the transcript from Roberts county was void. It recited on its face that it was issued on such transcript, and the sheriff of Grant county, the appellant here, might have declined to accept it or operate under it. * * * [*420] * * * We think the order of the circuit court amercing the sheriff was wrong and it is reversed. All the judges concurring.

Reversed.

8. THE FORM AND ESSENTIALS OF THE AFFIDAVITS, WRITS, ETC.

a. Attachment and Garnishment Affidavits.

As to the essentials of attachment and garnishment affidavits, and the effect of defects, prepare again upon *Cooper v. Reynolds*, ante, 15; *Greenvault v. Farmers & Mechanics' Bank*, ante, 24; *Wells v. American Express Co.*, ante, 31; *Pennoyer v. Neff*, ante, 48; *Emerson v. Detroit Steel & Spring Co.*, ante, 168; and *Jackson v. Burke*, ante, 170; *Hawes v. Clement*, ante, 159.

BURNHAM v. DOOLITTLE.

14 Nebraska 214, 15 N. W. 606. (1883)

Attachment and Garnishment Affidavit—Entitling—Averments—Attachment of Equity of Redemption.

Wales F. Severance, for plaintiff in error.

Samuel J. Tuttle, for defendant in error.

The Court by Lake, C. J. This petition in error presents two questions. *First.* Was the motion to quash the summons in garnishment properly overruled? *Second.* Was the plaintiff in error rightly held as garnishee? [*215] * * *

The objection to the summons was simply that the "affidavit on which the procedure is based is insufficient in not establishing that the garnishee has property of, or is indebted to defendant; and that" * * * "it is not entitled in any court, proceeding, or cause."

This objection is based in part upon the supposition that, to properly institute a proceeding of this kind, the affidavit must nec-

essarily show that the person to be summoned has property of the judgment debtor in his possession or under his control, or is indebted to him, and that a statement of *mere belief*, without more, will not answer. Referring to the statute, however, we find that nothing further is required to be stated than that the judgment creditor "has good reason to and does believe that any person or corporation (naming them) have property of and are indebted to the judgment debtor." Upon the filing of an affidavit, stating such belief, it is provided that the proper officer "shall issue a summons as in other cases, requiring such person or corporation to appear in court and answer such interrogatories as shall be propounded to him, it, or them, touching the goods, chattels, rights, and credits of the said judgment debtor in his, its, or their possession, or [*216] control." Sec. 244, Comp. Statutes, 562. Mere belief, therefore, is all that the statute contemplates, and consequently all that courts have the right to exact in affidavits of this kind. If it had been intended that the facts and circumstances inducing such belief should be given, and their sufficiency determined by the court, it is but reasonable to suppose that language altogether different from this would have been employed.

The other point of this objection, viz., that the body of the affidavit was without a title, is merely technical. In the affidavit it is clearly averred that it was a transcript of the record of the writ of Doolittle & Gordon v. W. Sanford Gee, that had been filed in the district court, and it was against "the property of the said W. Sanford Gee" that the garnishment proceeding was directed. Besides, the affidavit was endorsed, "Doolittle & Gordon against W. Sanford Gee," and this is also the endorsement of the summons served upon the person garnished. There could not have been, therefore, any possible doubt as to the case in which it was intended to use the affidavit, nor as to the persons sought to have affected by it. There was neither uncertainty nor ambiguity in any particular, and we are aware of no purpose that would have been better served by prefixing the title of the cause to the body of the affidavit.

The only remaining question is whether the judgment debtor's equity of redemption, or interest in the two promissory notes, could be reached and held by the process of garnishment? It must be conceded that according to most of the cases bearing upon this

question, it could not. 1 Wait's Actions and Defences, 422, 423. Following this general current of authorities, we held in *Peckinbaugh v. Quillin*, 12 Neb. 586, that it is only when a mortgagor of goods has the right of possession for a definite period that he has an attachable interest in them. This rule did not influence the result of that case, however, for the reason that the property was insufficient to satisfy the mortgage [*217] debt. But in view of our attachment law, and the ruling of the supreme court of Ohio on a statute from which ours was copied, and upon more mature reflection, we are now satisfied that whatever interest a mortgagor of chattels may have in them, in this state, may be reached by seizure under a writ of attachment at any time while in his possession, and by means of the process of garnishment if they have passed into the hands of the mortgagee. And to this extent our opinion in the case of *Peckinbaugh v. Quillin* must be modified. In the case of *Carty v. Fenstemaker*, 14 Ohio State 457, which arose under a statute just like our own respecting this matter, it was distinctly held that the interest of a mortgagor of chattel property in possession of the mortgagor, after condition broken, was attachable. The seizure of the property under the order of attachment, it was said, "creates a lien in favor of the attaching creditor upon the interest of such mortgagor." * * * [*218] * * *

Judgment affirmed.

STOUT v. FOLGER.

34 Iowa 71. (1871)

Attachment Affidavit—Amendment—Omission of Signatures.

Motion to quash attachment. Granted. Plaintiff appeals. Reversed.

The Court by Day, J. * * * In sustaining the motion to quash the attachment, the court, in our opinion, erred. It may be conceded, as claimed by defendant, that the affidavit is essential, and that a writ issued without it would be void. But here it is rendered reasonably certain that the petition was sworn to before the attachment issued; and the failure of the plaintiff to sign the affidavit, [*77] and of the officer to sign the certificate, resulted merely from oversight consequent upon the haste in which the act was done. Before the motion to quash was passed upon an amended petition was filed, which was properly sworn to, alleging that the

causes of attachment existed at the time the writ was obtained.

* * *

Reversed.

WILLIAMS v. INTERNATIONAL GRAIN & STOCK BOARD.

99 Michigan 80, 57 N. W. 1089. (1894)

Garnishment. Dismissed. Plaintiffs bring certiorari. Reversed.

The Court by Grant, J. * * * The affidavit in each case was made by one of the plaintiffs, and stated all the requirements of the statute, and that the said plaintiffs "are justly apprehensive of the loss," etc., "unless a writ of garnishment issue." In *Weimeister v. Manville*, 44 Mich. 408, 6 N. W. 859, the affidavit was held defective because the agent of the plaintiff, who made the affidavit, swore that the plaintiff was justly apprehensive,—a fact that he could not know. Where the affidavit is made by one of the plaintiffs, and he swears that they are justly apprehensive, it must be presumed that he has personal knowledge. We think the court erred in quashing the proceedings, and the judgments are therefore

Reversed.

b. The Form and Essentials of the Writs.

Under this head prepare again: *Roberts v. Connellee*, ante, 78; *Keniston v. Little*, ante, 231; *Gardner v. Mobile & N. Ry. Co.*, ante, 238.

PARSONS v. SWETT.

32 New Hampshire 87, 64 Am. Dec. 352. (1855)

Writs—Essentials—Teste—Motion of Quash.

A plea in abatement of an original writ, for that it was tested in the name of a chief justice who had resigned, was held bad in form. Then a motion to quash the writ for the same cause was made. Denied.

The Court by Perley, C. J. The constitution of New Hampshire, article 87, provides that "all writs issuing out of the clerk's office in any of the courts of law, shall be in the name of the state of New Hampshire; shall be under the seal of the court whence they issue, and bear the *teste* of the chief, first, or senior justice of the court, and shall be signed by the clerk of said court."

Provisions of the constitution are to be interpreted by the

same rules that are applied in the construction of similar provisions in statutes; and the party that would avail himself of any provision in the constitution must do it in the same manner and in the same time and order, that would be required in cases of like provisions in statutes. *Ripley v. Warren*, 19 Mass. (2 Pick.) 592; *Marston v. Brackett*, 9 N. H. 336, 349.

Before the revolution all writs in the province of New Hampshire were in the king's name; and probably when the change was first made, by substituting the name of the state for the regal style, one object was to avoid all appearance of recognizing the royal authority. If beyond this there is any design to give authenticity and credit to legal process, by requiring an actual attestation of the chief, first, or senior justice of the court, the practical construction which has uniformly been put on this provision of the constitution has wholly defeated that object; for the ordinary process of the court never in fact bears the actual signature of the chief justice, but his name is printed into the blank writs before they are delivered out of the clerk's office. The *teste* of the writ is therefore in practice a mere matter of form.

A writ which issues without the proper *teste* is not in terms declared by the constitution to be void, and we think is not to [*89] be held so by construction. In the same article of the constitution writs are required to be signed by the clerk, but a writ is not void because it wants the signature of the clerk, and the objection will be overruled, if not seasonably made. *Lovell v. Sabin*, 15 N. H. 29, 37.

In Massachusetts, upon the construction of a similar provision in their constitution, it has been decided that the want of a proper *teste* is mere matter of form, and must be taken advantage of by seasonable objection—otherwise it will be held to have been waived. *Ripley v. Warren*, 19 Mass. (2 Pick.) 592.

In this case the want of a proper *teste* did not make the writ void. The plea in abatement was defective in form, and overruled. The motion to quash the writ was addressed to the discretion of the court, and that discretion was properly exercised by denying the motion. As a general rule, a motion to quash a writ for a cause which might be taken advantage of by plea in abatement, must be

made within the time limited for filing pleas in abatement. *Trafton v. Rogers*, 13 Maine 315.

Our practice requires such pleas to be filed within the first four days of the first term, and the court of common pleas were well warranted in holding that the defendants had waived their right to insist on the objection, by neglecting to make the motion until the second term.

Even if the plea in abatement had been sufficient, or the motion to quash had been seasonably made, the writ might have been amended, for it was not void, and the court had jurisdiction; as we understand to have been held in *Reynolds v. Damrell*, decided in Hillsborough county, July, 1849, and not reported.

We have not overlooked the case of *Hutchins v. Edson*, 1 N. H. 139, in which it was held that a writ of execution, not under the seal of the court, was void. The general language used in that case might tend to the conclusion that writs of mesne, as well as final process, were void, unless under the seal of the court. It is obvious, however, that there is an important distinction between the two kinds of writs, because to a writ of final process the defendant has no opportunity to object, by plea or motion, that it wants a seal or other constitutional requisite; whereas in the case of mesne process he may plead the defect, or make it the ground of a motion; and it may perhaps be found, when a case shall arise which presents the question, that the doctrine of *Hutchins v. Edson* ought not to be extended beyond the point expressly decided. *Foot v. Knowles*, 45 Mass. (4 Metc.) 386; *Brewer v. Sibley*, 54 Mass. (13 Metc.) 175; *People v. Dunning*, 1 Wendell 16; *Jackson v. Brown*, 4 Cowen 550.

SIDWELL v. SCHUMACHER.

99 Illinois 426. (1881)

Execution—Validity—In the Name of the People.

Ejectment in Wayne circuit court. Judgment for plaintiff. Defendant appeals. Reversed.

Plaintiff showed title through a judgment, special execution, and sheriff's deed thereon, received in evidence over defendant's objection. The execution did not run in the name of the people.

C. C. Boggs, for appellant.

James McCartney, for appellee.

The Court by Mulkey, J. * * * While there is some conflict of authority upon this subject, yet it is believed that the weight of authority establishes the proposition that, where the law expressly directs that process shall be in a specified form, and issued in a particular manner, such a provision is mandatory, and a failure on the part of the official whose duty it is to issue it, to comply with the law in that respect, will render such process void. On the other hand, it is well settled that there are many merely formal defects which do not have that effect. To illustrate, where the statute or constitution expressly requires that process shall issue under the seal of the court, and be tested in the name of and signed by the clerk, the failure to comply with either of these requirements would, as it is believed, according to the weight of authority, render the process void. The legislature or the people, through the constitution, have the unquestionable right to say of what process shall consist, and when they have declared that it shall be of a specified form, by implication all other forms are prohibited. If such laws are merely directory, then writs are as valid without [*434] their observance as with it, and every clerk would be at liberty to issue process in whatever form might suit his fancy. If one of these requirements may be omitted, all may, on the same principle. Under such a system, one clerk might conclude that the ceremony of attaching a seal was idle and useless. Another might think the writ would be sufficient with the seal, and that the addition of the name of the clerk would therefore be superfluous. Another might think all these requirements of the law are but idle ceremonies, and for them substitute something altogether different.

Under such a system of things, how could the defendant in the process know what was valid and binding upon him and what was not, and when to obey and when not? And how could the officer into whose hands it was delivered for execution know whether he would be protected in serving it or not? And what would become of the almost numberless questions discussed by the courts and legal authors, founded upon the supposed distinction between void and voidable process, if there are no essential requirements by which the one can be distinguished from the other?

It will, doubtless, be conceded that the constitutional require-

ment that all process "shall run in the name of the People," stands upon at least as high footing as the statutory provisions which require process to be issued under the seal of the court, and to be tested in the name of and signed by the clerk. That it is so regarded is expressly conceded in *Commissioners, etc. v. Barry*, 66 Ill. 496.

The decisions, therefore, with respect to the omission of a seal or other statutory requirement, will be directly in point upon the question involved in this case. * * * [*435] * * *

Bybee v. Ashby, 7 Ill. (2 Gilm.) 151, 43 Am. Dec. 47, like the present case, was an action of ejectment. The plaintiff, to show title in himself, relied upon a sale and sheriff's deed under a judgment rendered in Knox county circuit court, the land in controversy [*436] being situated in Fulton county. The execution under which the sale was made, by a mere clerical error was directed to the sheriff of Knox county, instead of Fulton county. * * * This court, in the course of its opinion, there said: * * * "Where the execution is not regular upon its face, as, for instance, it is issued without the proper seal of the court attached, or where, as in this case, it is directed to the sheriff of one county and delivered to the sheriff of another county to be executed, such process will not justify the officer in executing it, and all his acts under it will be absolutely void and he a trespasser, and the purchaser will acquire no right to the property purchased at the sale." * * * [*437]

Davis v. Ransom et al., 26 Ill. 100, was an action of replevin, for the recovery of certain chattels which were claimed under an execution sale. On the trial of the cause, the court below excluded as evidence the execution under which the sale was made, on the ground that it was not under seal, and on appeal to this court the ruling of the court below was sustained. * * *

In *Hernandez v. Drake*, 81 Ill. 34, where the validity of a sale of real estate under an execution to which the clerk had inadvertently omitted to sign his name was under consideration, it was said: "The next question presented is, what [*438] was the effect of the execution issued without the signature of the clerk? * * * The signature is as essential under this law as is the seal or other

specific requirement, and in its absence the writ must be held to confer no power upon the officer to whom it was directed."

Whatever the law may be with respect to the power of courts to allow amendments before judgments, where the parties have appeared in obedience to defective or even void process for the purpose of taking advantage thereof, of which we express no opinion, as it is not necessary to a decision of this case, the present review of the authorities clearly warrants the conclusion that a sale of land under an execution that does not run in the name of the People, that is not sealed, or is not signed by or directed to the proper officer, is absolutely void, and may be successfully resisted in any kind of a proceeding, or in any forum in which the question may arise..

* * *

Judgment reversed.

LOWE v. MORRIS.

13 Georgia 147. (1858)

Judicial Writs—Formal Essentials—Omission of Seal.

Motion to dismiss a writ of error for want of a seal. Denied.

Lumpkin, J. Is a writ of error a nullity without a seal?

My first impression was that this defect was fatal. Upon reflection, my final conclusion is the other way. * * *

His signet or seal was the pledge of *identity* and fidelity, exacted by Tamar of Lord Judah, one of the twelve princes of Israel. Moses' Reports, Book Genesis, c. 38, v. 18. See also Esther, c. 8, v. 8 and 10. It would seem from this last case, that even at this early period monarchs as well as courts at this day, could only act through their official seal. And the reason given is, that the precept issued in the king's name and sealed with his ring, by his clerk, Mordecai the Jew, *may no man reverse*. And this is the strong position of my learned brother. (M. anciently, as now, I would remark, was a favorite *initial* for the name of court clerks, from *Mordecai the Jew*, even down to *Martin, the Gentile*.) Whatever else there may be that is new under the sun, it is very evident from this last authority, that *mails* are not. For we are told that these letters mandatory of Ahasuerus were sent by *post*, on horseback, and riders on mules, camels, and young dromedaries.

So much for the antiquity and importance of seals. It will

be found, upon further investigation, that modern decisions adhere very strictly to these patriarchal precedents. * * * [*153]

The truth is, that this whole subject, like many others, is founded on the usage of the times, and of the country. A scroll is just as good as an impression on wax, wafer, or parchment, by metal, engraved with the arms of a prince, potentate or private person. Both are now utterly worthless, and the only wonder is, that all technical distinctions growing out of the use of seals, such as a statute of limitations, plea to the consideration, etc., are not at once universally abolished. The only reason ever urged at this day why a seal should give better evidence and dignity to writing is, that it evidences greater deliberation, and therefore should impart greater solemnity to instruments. Practically we know that the art of printing has done away with this argument. * * *

So long as seals distinguished identity, there was propriety in preserving them. And as a striking illustration, see the signatures and seals to the death warrant of Charles the First, as late as January, 1648. They are 49 in number, and no two of them alike. But to recognize the waving, oval circumflex of a pen, with those mystic letters to the uninitiated, L. S. imprisoned in its serpentine folds, as equipotent with [*154] the coat of arms taken from the devices engraven on the shields of knights and noblemen; shades of Eustace, Roger de Beaumont, and Geoffry Gifford, what a desecration! The reason of the usage has ceased; let the custom be dispensed with altogether.

In *Jones & Temple v. Logwood*, 1 Washington (Va.) 42, President Pendleton states, that there was a period when the impression was made with the eye-tooth, and thinks there was some utility in the custom, since the tooth's impression was the man's own, and presented a test in case of forgery. But this reason, however applicable in Virginia in 1791, does not hold true in this epoch of dentistry, when no man's tooth is his own, but teeth, like almost everything else, are artificial. * * *

What magic, I ask, is there in our own seal? True, the clerk has attested this writ of error in his official name, and by his private seal, and in obedience to it, the clerk of the circuit court has certified and transmitted to this court all the records and papers

of file in the court below, which are necessary to enable us to hear and determine properly this cause, upon its merits. But then we look in vain on this writ for the three pillars supporting an arch, with the word constitution engraven within the same, emblematic of the constitution, supported by the three departments of government: legislative, judicial, and executive. The first having engraven on its base, wisdom, the second, justice, and the third, moderation, and then on the right of the executive column, a man standing with a drawn sword, and resembling most strikingly [*155] in figure and attitude our most worthy and excellent chief magistrate. But I forbear.

Illi robur et aes triplex. He would be a bold judge indeed, who would venture to decide *an issue of law* in the absence of this *speaking* device! There is a charm in that arch—a spell in those pillars—an inspiration in the eye of that fierce-looking swordsman, which guarantees a faithful administration of justice, although simply and but very imperfectly impressed on the foolscap paper on which the writ of error is printed, instead of wax or some other tenacious substance.

To whom we are indebted for the change in our seal, I am not antiquarian enough to state. The old devices I always venerated; the one side the scroll on which was engraved the constitution of the state of Georgia and the motto, *pro bono publico*. On the other side, an elegant house and other buildings, fields of corn, and meadows covered with sheep and cattle; a river running through the same, with a ship under full sail and the motto, *Deus nobis haec otia fecit*. The Latinity as well as the piety of this seal, commend themselves to my hearty admiration. They will challenge a comparison, even on the score of architectural taste too, with the *arch* resting on *three pillars*. But then the capital defect in the old seal—who does not anticipate me?—was the absence of that *cocked-hat swordsman*. Without this *addendum*, it is difficult to decide that any public document can impart absolute verity. This it is, I am sure, that has exerted such a controlling influence over the judgment of my dissenting brother, with his well-known military propensities.

The act of 1845 authorizes this court to establish and procure

a seal. My recollection does not serve me whether the state coat of arms was selected as the device. I take it for granted it was. If so, where, upon any seal attached to any writ of error or citation returnable to this court, are those three potent and cabalistic words: wisdom, justice, and moderation? Do not these constitute a part of the seal just as much as the seal does a part of the writ of error? Is it the seal of this court without them? If so, how much, and [*156] what portions of it may be omitted and still leave a good seal? Would it be a seal without the arch, without the pillars, without the motto? I forbear even to put the question whether it would be a seal without the *military effigy*—without that *cocked-hat swordsman*? Of course it would be a nullity. As well talk of a *man* without a *body*!

For myself, I am free to confess that I despise all forms having no sense or substance in them. And I can scarcely suppress a smile, I will not say “grimace irresistible,” when I see so much importance attached to such trifles. I would cast away at once and forever, all law not founded in some reason—natural, moral, or political. I scorn to be a “*cerf adscript*” to things obsolete, or thoroughly deserving to be so. And for the “gladsome *lights of jurisprudence*” I would sooner far, go to the reports of Hartly (Texas), and of Pike and English (Arkansas), than cross an ocean, three thousand miles in width, and then travel up the stream of time for three or four centuries, to the ponderous tome of Sidenfin and Keble, Finch and Popham, to search for legal wisdom. The world is changed; our own situation greatly changed; and that court and that country is behind the age that stands still while all around is in motion.

I would as soon go back to the age of monkery—to the good *old* times when the sanguinary *Mary* lighted up the fires of Smithfield, to learn true religion; or to Henry VIII., the British Blue-Beard, or to his successors, Elizabeth, the two James’s and two Charles’s, the good *old* era of butchery and blood, whose emblems were the pillory, the gibbet and the axe, to study constitutional liberty, as to search the records of black-letter for rules to regulate the formularies to be observed by courts at this day.

I admit that many *old* things may be *good* things—as old wine,

old wives, ay, and an old world too. But the world is older, and consequently wiser now than it ever was before. Our English ancestors lived comparatively in the adolescence, if not the infancy of the world. It is true that Coke, and Hale, and Holt caught a glimpse of the latter-day glory, but [*157] died without the sight. The best and wisest men of their generation were unable to rise above the ignorance and superstition which pressed like a nightmare upon the intellect of nations. And yet we, who are "making lightning run messages, chemistry polish boots and steam deliver parcels and packages," are forever going back to the good *old* days of witchcraft and astrology, to discover precedents for regulating the proceedings of courts, for upholding seals and all the tremendous doctrines consequent upon the distinction between sealed and unsealed papers, when *seals de facto* no longer exist! Let the judicial and legislative axe be laid to the root of the tree; cut it down. Why cumbereth it, any longer, *courts and contracts*?

Having treated this subject scripturally and historically, though very discursively, I propose to add a word or two upon the physiological aspect of the question. And I repeat the interrogatory propounded at the beginning of this opinion, namely: What defect will make a writ of error void? And I answer the query by proposing another: What defect, original or supervenient, will reduce man from the genus *homo*?

Will the amputation of the feet and legs disfranchise a descendant of Adam of his title to manhood! It will not be denied but that he may lose every limb of the body and leave nothing but the naked trunk, and yet be a *man* "for a' that." And is the seal, though it be constituted of the arch, and pillars, and swordsman, more essential to the writ of error, or a pedestal to support it, than legs and feet and arms are to manhood? Common sense will decide. * * *

Motion denied.

Warren, J., delivered an opinion agreeing with Lumpkin, J., and Nesbit, J., filed a dissenting opinion.

PEOPLE v. DUNNING.

1 Wendell (New York) 16. (1828)

In the Supreme Court, Savage, C.J., Sutherland, and Woodworth, JJ.

Execution—Liability of Sheriff for Default—Deputy Insolvent—Writ Unsealed.

Attachment against sheriff of Saratoga for failure to return an execution. He answered that the alleged execution was not sealed, and that the deputy who received it and under it received \$165 from the judgment debtor, was insolvent and had paid none of it to the sheriff.

The Court by Sutherland, J. The only question is, whether the process is void or erroneous. The sheriff supposed it to be void, and that the sureties of the deputy were not responsible to him for the money received on the execution. This is a mistake. The process was erroneous and not void, and therefore amendable (*Jackson v. Brown*, 4 Cowen 550); and the money having been received by the deputy *colore officii*, his sureties are liable and the sheriff is responsible to the plaintiff. The party not having applied to set aside the execution, the sheriff cannot avail himself of defects in it, and must pay the money or stand committed.

PORTIS v. PARKER.

8 Texas 23, 58 Am. Dec. 95. (1852)

Execution—Validity—Defective Style—Levy—Return.

Motion to quash an execution, levy, and return. From an order denying the motion defendant appeals. Affirmed.

The grounds of the motion were that there was no valid levy, and that the writ was not styled according to law. The execution commences: The State of Texas, County of Austin. To the sheriff of said county; Greeting. The effect of the return was that he had levied on 450 head of cattle, more or less, as they run, branded with a gudgeon; that all of the property was claimed by Rebecca Portis; and that she had given bond to try her title.

N. Holland, for plaintiff in error.

N. H. Munger and *J. B. Jones*, for defendant in error.

The Court by Hemphill, C. J. The objection to this return

is that it nowhere shows an actual seizure of the property or the performance of any such act by way of asserting title as would have subjected the sheriff to an action for the trespass were he not protected by the process. In the case of *Bryan et al. v. Bridge et al.*, 6 Texas 137, we held at the last term that an actual possession of personal property was essential to the validity of the levy, and that the act of taking possession must be of such character as would make the officer, if not protected by the process, liable for the trespass. * * * [*27] * * * It may be admitted that the return of the sheriff, if the claim had been interposed by some third party, would have been insufficient without amendment and without proof, *aliunde*, of facts establishing the notoriety of the levy and a disturbance of the possession of the defendant; but under all the circumstances indicated by the return in this case we deem the levy sufficient, and that its validity cannot be disputed by the defendant. If the sheriff were sued for a trespass to the property he could not contest [*28] the fact of seizure. * * *

It is difficult to prescribe any special mode for a levy upon wild cattle. A levy must combine notoriety with such seizure as would enable the sheriff to control and keep in safety the property. At the same time the possession must be according to the nature of the property, and the act of the sheriff should not subject the defendant to any unnecessary expenses to be incurred for its preservation. If wild cattle were penned and fed until the day of sale, the expenses would consume a great portion of the property. If herdsmen were employed to guard them, the charges would be onerous on the defendant. It may be said that the latter can always avoid such expense by giving bond for delivery. This might not always be convenient, and in many cases would be oppressive. As the subject of a proper rule in such cases has not been discussed by counsel, I will waive further remarks.

As the argument has extended to the validity of the execution, though no prayer is made that it be quashed, I will barely say that the objection to the style of the process, where this has performed its functions and the rights of parties depend on its validity, cannot be sustained. The terms employed here may be treated either

as a style or as a caption. No caption, no venue, in fact is necessary. The addition of the name of the county may be rejected as surplusage, and "The State of Texas" would then stand alone and give character and style to the process. Had the objection been taken to the process *in limine*, it might have been quashed or amended, [*29] and such would be the better practice. The style, as such, gives authority to the officer, and it should not be coupled with additions which, if not rejected, would reduce it to a mere description of the place whence the process emanated. We are of opinion that there was no error in the judgment, and it is ordered that the same be affirmed.

Judgment affirmed.

BACKALAN v. LITTLEFIELD.

64 North Carolina 233. (1870)

Attachment Writ—Validity Without Return-day—Effect of Appearance.

Motion to quash a summons and warrant of attachment for irregularities. From an order granting the motion plaintiff appeals. Reversed.

The Court by Rodman, J. * * * The attachment was irregular, because it did not state when and where it should be returned, S. 203, C. C. P.; and it is contended that it was void, and that the defect could not be cured by any subsequent waiver. It seems to us, however, that the attachment, in this case, was merely irregular, and that the irregularity was waived by the defendants appearing, and giving the undertaking required to have a return of the property. I have not seen, anywhere, an attempt made to draw the line in principle, between process [*235] which is void, and that which is only voidable, although the difference is important in its consequences, for the sheriff may justify, under voidable process, but not under void; the books confine themselves to giving illustrations of each. 1 Tidd, Pr., 512; McNamara on Nullities. The only object there can be in requiring an attachment to have a certain time and place of return, is, that the defendant may know when and where to appear, and move in it. In this case, the defendant, through advertisement, and otherwise, obtained sufficient knowledge, and therefore, was not, in any way damaged by the omission.

We think the judge erred in quashing the attachment, and that the defendant was entitled to plead to the complaint.

Judgment reversed.

MILBURN v. STATE to use of Ray & Wife.

11 Missouri 189, 47 Am. Dec. 148. (1847)

Action on the official bond of Milburn as sheriff of St. Louis county, for that Milburn did not return a certain execution as he was commanded. Defendant pleaded seven pleas, one of them that the writ was not returnable in any term. Plaintiff had judgment, and defendant appeals. Affirmed.

The Court by Napton, J. * * * This suit is based upon the provisions of the 52d section of the execution law, as it stood in the Rev. Code of 1835. That section made the sheriff liable upon failing to return a writ according to law, for the whole amount of money specified in the writ. The writ in this case was made returnable in vacation, whereas the law requires it to be made returnable to the next succeeding term, unless the plaintiff otherwise directs. Does this error make the writ void? The authorities cited at the bar are decisive upon this point. A writ returnable out of term is merely erroneous and not void. *Campbell v. Cumming*, 2 Burrows 1187; *Cramer v. Van Alstyne*, 9 Johns. 386.

A process merely erroneous is a justification to the officer who executes it; and on the other hand, the officer who fails to execute it, and is sought to be held responsible for such delinquency, cannot take advantage of the error. 2 Saund. 101, n. 2, and cases there cited.

If we take these principles to be settled in relation to final process, we do not see how the defendant can escape the penalty affixed by law to his failure in not returning the execution against Dodd, according to the directions of the law, regardless of the mistake of the clerk who issued it. The case in 7 Ky. (4 Bibb) 322, *Wilson v. Huston*, is directly in point. The execution in that case, was made returnable more than 90 days from its teste, when by the law of Kentucky, the execution should have been returnable in 90 days. The court held that the return was fixed by law; that the writ was not void, but that the sheriff was bound to obey

it; that the sheriff was bound to take notice of the law, and as the return day was fixed by the law, his duty was to return it on that day and not on the one erroneously specified in the writ. It is impossible to distinguish that case from this in principle. Instead of being returnable within 90 days, as in Kentucky, the writ here is returnable, as in England, in term time, and the authorities upon which the Kentucky court rested their opinion are more directly and literally applicable to our statute than to theirs.

The hardship of the case is most manifest; but it grows out of the statute, which inflicts a penalty upon the sheriff greatly disproportioned in many cases to the delinquency. The principles of law affixing the sheriff's liability [*192] are the same, which in other cases would be essential to his protection.

McBride, J., concurring, the judgment is affirmed. *Scott, J.*, did not sit.

CRAMER v. VAN ALSTYNE.

9 Johnson's Rep. (New York) 386. (1812)

Motion to amend a *ca. sa.* on file by changing the return day.

Per Curiam. The case of *Campbell v. Cumming*, 2 Burr. 1187, is in point. Where an execution is returnable out of term it is not void, though liable to be set aside on motion for irregularity. It may, therefore, be amended, though it would be otherwise as to mesne process. We grant the motion to amend on payment of costs.

BANK OF MISSOURI v. MATSON.

26 Missouri 243, 72 Am. Dec. 208. (1858)

Attachment—Defective Writ—Bad Return-day—Release of Surety by Abandoning Collateral.

Action by the Bank of Missouri against Matson as surety on a promissory note executed by one Lennox, and indorsed to the plaintiff. Defendant claimed a discharge by virtue of a release of an attachment of Lennox's property in an action by the plaintiff against him on this note. The attachment mentioned was issued March 20, 1849, and made returnable April 2, following. The plaintiff claims that the attachment was therefore void, and

the bank justified in dismissing it. Defendant insists that the attachment was not void because returnable too soon, and was not made bad by reason of containing a summons also returnable too soon.

The Court by Napton, J. In this case the bank relies on the nullity of the writ of attachment to show that no lien was acquired, and therefore that she was exempt from the operation of the rule that a creditor who gets a lien on the property of the principal debtor and voluntarily lets it go discharges the security. The question of diligence or negligence on the part of the bank is not in the case. That doubts may have been with propriety entertained in relation to the validity of this writ of attachment is quite manifest, and we would be very reluctant to hold the bank to a forfeiture of her security merely by reason of a wrong decision upon this point.

Few questions in a lawyer's practice could arise more embarrassing in their determination than such as require him to fix upon the line where a writ ceases to be a nullity and is merely erroneous. Decisions have fluctuated, and contradictory cases may be found. Neither ancient nor modern cases point out very clearly a rule by which such questions can be decided. I will briefly advert to some general principles which in my judgment ought to control the decision of such questions. Mesne process, whose object is notice, ought to be governed by different rules from final process; and the adjudged cases keep this distinction in view. Final process has been always construed with favor, where mistakes have no tendency to oppression. It is important that the officer should be protected, and that the purchaser under an execution should get a good title. The writ of *capias*, whether used as mesne or final process, has always been construed with strictness for obvious reasons which have no application to our writ of summons. A distinction may also reasonably obtain between writs issuing from courts of general and those emanating from courts of limited jurisdiction. There is sound policy in requiring justices of the peace to conform closely to the statutory power confided to them, not with reference to the mere forms of their proceedings, but with reference to the line of their jurisdiction.

Writs [*248] issuing from courts of record, where proceedings are more dilatory and are under the supervision of the judges, the bar, and the public, may properly be regarded with more leniency.

These considerations will probably show that the cases of *Sanders v. Rains*, 10 Mo. 770, and *Milburn v. Gilman*, 11 Mo. 64, are not conflicting. Neither of these cases is, however, decisive of the question here. The writ of attachment, although containing a clause of summons, and although usually and in this instance the commencement of proceedings, is really more nearly allied to final than to mesne process. It is substantially a writ of execution, except that it emanates at the beginning instead of the termination of a suit. Its object is to seize and hold property subject to the claims sued on and to satisfy them. The suggestion of the counsel for the defendant in this case, that the validity of the writ of attachment ought not to depend upon the validity of the clause of summons contained in it, is entitled to consideration. It may seem novel, and the statute makes the clause of summons an essential portion of the writ of attachment, but in effect they may be regarded as two separate writs, and with separate objects—the one directing the officer to seize property as a security for the creditor—the other directing the officer to advise the debtor of what has been done. Of course the court will not permit the property seized to be subjected to the payment of the debt, unless the debtor is legally advised of the proceedings; but it is not perceived why the invalidity or total nullity of the summons should necessarily make the attachment also a nullity. The summons is a constituent part of the attachment and may be conceded to be a mere nullity; yet it does not follow, for this reason alone, that the attachment is void, and the levy under it illegal, and the officer a trespasser. The defendant may appear, the writ may be amended, or a new summons issued. All this only tends to delay the creditor, not to oppress the debtor. If the property has been improperly attached, the statute has provided an ample remedy in the bond and security required of the creditor. [*249]

If the writ in this case had been a simple summons and made returnable sooner than the law authorized and a judgment by de-

fault was taken, the validity of such a judgment might be questioned. But that is not this case. The writ of attachment is made returnable at a day earlier than by law is warranted. Under this writ property is taken and the party defendant summoned. So far as the summons is concerned it may be regarded as a nullity, although we would not be understood as so deciding; and yet the remainder of the writ, under which the levy is made, does not necessarily fall with the summons. It is like an execution, and ought to be governed by the rules which are applicable to executions. An execution returnable at a day later than by law it should have been, has been held only voidable. *Milburn v. Gilman*, 11 Mo. 64. To hold the attachment a nullity is to make the officer and all concerned in its levy trespassers. We see no injury which can result from considering the writ only voidable. * * *

Scott, J., concurring, the judgment is affirmed; *Richardson, J.*, dissents, being of the opinion that the writ of attachment was void.

DE LOACH v. ROBBINS.

102 Alabama 288, 48 Am. St. Rep. 46, 14 South. 777. (1893)

Execution Sale—Collateral Attack—Variance between Writ and Judgment—Parol Proof—Premature Execution—Execution on Dormant Judgment.

Statutory ejectment by John DeLoach against T. J. Robbins. From judgment for defendant plaintiff appeals. Reversed.

J. W. Posey, for appellant.

J. N. Miller, contra.

The Court by Haralson, J. 1. While it is true that an execution should follow and correspond with the judgment on which it issues, yet, justice and reason do suggest, that mere clerical errors or failures to recite the judgment with strictness ought not to avoid the execution; and it is everywhere, so far as we have observed, so decided. And when an execution is offered in evidence to support a sale made under it by a sheriff after levy, and it varies from the judgment in some respects, the question then before the court is, "Did *this* execution issue on *this* judgment?" If from the whole writ, taken in connection with other facts, the court feels assured that the execution offered in evidence was intended,

issued and enforced as an execution upon the judgment shown to the court, then we apprehend, the writ ought to be received and respected. * * * Where sufficient appeared on the face of the execution to connect it with the judgment, courts have frequently disregarded variances in the names of parties, in the date or in the amount of the judgment."—Freeman on Executions, § 43, and authorities there cited; 7 Amer. & Eng. Encyc. of Law (1st Ed.) 123-4, n. 13; *Samples v. Walker*, 9 Ala. 726; *McCollum v. Hubbert*, 13 Ala. 282; *Steele v. Tutwiler*, 68 Ala. 107; *Sandlin v. Anderson*, 76 Ala. 403; *Davis v. Kline*, 76 Mo. 310. In the case last named two executions and the sheriff's deed thereon recited judgments in the year 1875, while the minutes of the court showed they were rendered in 1876. There being other evidence to show that the executions were in fact issued on these judgments, it was held that the variance was a clerical misprision, and would not invalidate the execution.

2. Where an execution has prematurely issued on a valid judgment, as we have held, it is not on that account void, but only irregular and voidable, and not having been set aside in a direct proceeding for that purpose, [*295] a sale under it cannot be collaterally impeached; and, where execution has issued after the lapse of ten years from the date of the last preceding one it is merely irregular and voidable, and a sale under it, as for such an irregularity, as we have repeatedly held, will be sustained.—*Sandlin v. Anderson*, 76 Ala. 403; *Leonard v. Brewer*, 86 Ala. 390; *Waldrop v. Friedman*, 90 Ala. 157; *Olmstead v. Brewer*, 91 Ala. 124.

3. Parol evidence is always admissible to point out and connect the writing with the subject matter, and identifying the object proposed to be described. And so such evidence is admissible to explain away any mere immaterial and not substantive variations between an execution and the judgment on which it is issued.—*Guilmartin v. Wood*, 76 Ala. 204; *Corbitt v. Reynolds*, 68 Ala. 378; *Doe v. Pickett*, 51 Ala. 584. And, on still higher grounds, the execution docket of the clerk is admissible, in such connections, to identify and unite a judgment and executions which issued on it, for this is record evidence, such as the law requires to be kept for such purposes among others.—Code, § 768, sub-div. 7.

4. Let the foregoing principles be applied to this case. The two judgments on which the executions issued were, so far as appears, in all respects regular and valid, one in favor of John De Loach, as administrator of John Black, at the fall term of the circuit court of Monroe county, 1868, against defendant, T. J. Robbins, for \$684.95, besides costs; and the other, in favor of John B. Colly against the defendant, at the spring term of said court, 1873, for \$239.53, and costs. Executions issued, as was shown, on each of these judgments, returnable to the next term of the court after their rendition, respectively. The plaintiff in the second judgment, John B. Colly, died after its rendition, and plaintiff DeLoach became his administrator, and, on proof of these facts by affidavit of plaintiff, the clerk of the court thereafter issued execution on said judgment in favor of the plaintiff, as administrator of said Colly, under which the land in question was sold by the sheriff, and plaintiff became the purchaser, the sale having been made under this and the other execution issued in the Black administration case at the same time.

In the other case—that of DeLoach, administrator of Black, against the defendant—after the issuance of the [*296] original execution, *aliases* were issued on the 25th of October, 1876, 15th of May, 1887, and 9th of June, 1885. In some of these there were irregularities, some slight and others of a graver character. It is unnecessary to mention them. A sale of the property levied on was made by the sheriff under the last named execution, but when it was offered, and the sheriff's deed with it, objection was made on account of a variance between the judgment and execution. The plaintiff offered evidence, all of which was admissible for the purpose, to explain the variance and to show that it was the result of clerical error, and that the execution, as a matter of fact, issued on the judgment in evidence. The objection of the defendant to the introduction of this evidence was improperly sustained by the court. It showed a judgment against the defendant, an execution thereon, levy and sale to the plaintiff by the sheriff, and a proper deed from him to the plaintiff, to convey the interest of defendant in the lands. But if there were any legal objections to the validity of the sale under this execution, *alias* executions were issued after-

wards on both of said judgments—presumably to obviate any irregularities which might have intervened as affecting the first sale, by which it might be set aside—were placed in the hands of the sheriff, together with the execution in the Colly case, were both levied on the same land, which was sold thereunder by the sheriff, and plaintiff again became the purchaser, and the sheriff made him a deed, in all respects formal and duly executed; to convey to him the right and title to the lands as sold under said execution. The only alleged barrier to the validity of this last sale, so far as appears, is, that the execution in the DeLoach judgment was issued on a judgment on which no execution had issued for more than ten years, a fact not sustained by the evidence, but which, if true, did not render said sale void, even as to that execution. A sheriff's sale, when made under two executions, as in this case, either of which is valid, is sufficient to transfer to the purchaser the defendant's title to the property sold.—12 Amer. & Eng. Encyc. of Law (1st Ed.) 225, note 4.* * * [*207]

Reversed and remanded.

GORDON v. CAMP.

3 Pennsylvania State (3 Barr) 349, 45 Am. Dec. 647. (1846)

Execution—Validity of Sale—Address—Who Execute.

Replevin in Bradford common pleas by Sill Camp against Gordon. At the trial Camp showed title in himself and rested. Defendant offered in evidence a judgment of a justice of the peace against Camp and another, execution thereon to the constable of Herrick township, and a return thereon by the constable of Standing-Stone township, showing a levy and sale of the property to the defendant. This evidence was rejected and judgment given for the plaintiff.

*The Court by Burnside, J. * * * [*350]* It has been held that a warrant directed by the justice to constable, if it is executed by the proper constable of the district, is well directed. The reason given is, that the word constable, with a *blank*, cannot be said to be directed to the wrong constable, and may be understood as directed for the right one. It is better to direct it to the constable by name, or to the constable of the district generally. *Paul v. Vankirk*, 6 Binn. (Pa.) 125.

A justice issued an execution directed to the constable of B. district, four miles from the township of A., where the defendant resided, a township lying between them; it was held, that as the act was directory, the justice was to determine the next constable most convenient to the defendant, and that the execution was for that reason not void. *Smith v. Schell*, 13 Serg. & Rawle, 336.

No case has been decided, that an execution directed to the constable of a particular township, can be handed over by him to the constable of another township, to whom it was not directed, and that the latter could legally execute it.

Here the execution was directed to the constable of "Her-rick," who gave it to the constable of "Standing-Stone." Every act done by the constable of Standing-Stone was illegal. His sale was as if no execution had issued. His acts were utterly void; and he was a trespasser. It is contended we should sanction this practice, because it prevails, and is convenient in Bradford county. If so, the sooner an end is put to the practice, the better. There is no law to authorize it; and all trading between constables leads to corruption and injustice, and should be discouraged. [*351]

It does not appear that any money was paid, and the constable returned, not that he had received the money, but *that he had sold for \$39.75. Sale indemnified by James Gordon, 11th March, (the sale was on the 10th,) the above property replevied.* Signed H. S. Stephens, constable of Standing-Stone.

The rejection of this return of sale is the only error complained of. In so doing, the court was clearly right.

The judgment is affirmed.

Cooley, J. "The case of the officer is next to be considered. It is claimed, first, that he is liable [in trespass by the judgment debtor for the wrongful levy after defendant had appealed from the judgment on which the execution was issued] because the process was not addressed to him, and therefore he had no authority to serve it. But the statute expressly empowers sheriffs to serve the process which constables may execute (Comp. Laws, 1871, § 568); and it does not require that there should be any special direction for the purpose. * * * No error was therefore committed in holding the officer not liable." *Foster v. Wiley*, 27 Mich. 244, 15 Am. Rep. 185.

MENDERSON v. SPECKER.

79 Kentucky 509. (1881)

The Court by Hargis, J. The appellees, on Feb. 17th, caused a general attachment against the property of Maddox to be issued and *directed to the sheriff*, which was on the same day served upon Boyd as garnishee by a constable. On the next day thereafter the appellants also sued out an attachment against Maddox's property, and had it directed to the *sheriff or any constable*. It was served upon Boyd by a constable, who delivered him a copy of the attachment. Thereupon the appellees caused a second attachment to issue directed to the sheriff, who executed it upon Boyd by delivering to him a copy of the attachment, with a notice specifying the debt attached indorsed on the back of it. Boyd paid the amount of the debt owing by him to Maddox into court, and it was adjudged that appellees had obtained priority to the fund under their attachment, over the appellants who prosecute this appeal to reverse that judgment.

Any officer to whom the summons is or might have been directed may serve it according to §47 Civ. Code; but this is not the case with reference to the service of attachments, as there is no provision of the code which authorizes the service of an attachment by any officer to whom it might have been directed, but to whom it is not in fact directed. * * * [*511] * * * It must therefore follow that the service of appellees' first attachment by the constable, when it was directed to the sheriff, was illegal. as appellees' second attachment and appellants' only attachment, were each executed by the officer to whom they were directed, the question of priority must be determined by the manner in which the attachments were executed * * *

As the execution of appellees' second attachment was accompanied by the statutory notice, they were properly [*512] adjudged priority over the appellants, whose attachment was not executed in conformity to the sub-section named. Civ. Code, §203, 3.

Judgment affirmed.

c. THE EXECUTION OF THE PROCESSES.

1. THE LEGISLATURE'S POWER TO CHANGE THE REMEDY.

EDWARDS v. KEARZEY.

96 United States 595. (1877)

Constitutional Law—Obligation, Contract, and Impairing Defined—Exemption Laws—Stay Laws—Limitation of Actions—Imprisonment for Debt.

ERROR to the supreme court of the state of North Carolina.

This action was commenced by Leonidas C. Edwards, March 31, 1869, in the superior court of Granville county, North Carolina, against Archibald Kearzey, to recover the possession of certain lands in that county. They were levied upon and sold by the sheriff, by virtue of executions sued out upon judgments rendered against Kearzey, on contracts which matured before April 24, 1868, when the constitution of North Carolina took effect, the tenth article of which exempts from sale under execution or other final process, issued for the collection of any debt, the personal property of any resident of the state, and "every homestead, and the dwelling and buildings used therewith, not exceeding in value \$1,000, to be selected by the owner thereof." Prior to that date, under statutes since repealed, certain specified articles of small value, and such other property as the freeholders appointed for that purpose might deem necessary for the comfort and support of the debtor's family, not exceeding in value \$50 at cash valuation, and fifty acres of land in the county and two acres in the town of not greater value than \$500, were exempt from execution. The lands in question were owned and occupied by Kearzey as a homestead, and as such were set off to him pursuant to the mode prescribed by the legislation for carrying the constitutional provision into effect. He had no other lands, and they did not exceed \$1,000 in value.

Edwards was the purchaser at the sheriff's sale of said lands, and received a deed therefor.

The court found for Kearzey, upon the ground that so much of said art. 10 as exempts from sale, under execution or other final process obtained on any debt, land of the debtor of the value of \$1,000, and the statutes enacted in pursuance thereof, embrace within their operation executions for debts which were contracted before the adoption of said constitution; and that said article and said statutes, when so interpreted and enforced, are not repugnant to art. 1, sect. 10, of the constitution of the United States, which ordains that no state shall pass any law impairing the obligation of contracts.

Judgment having been rendered upon the finding, it was, on appeal, affirmed by the supreme court of the state. Edwards then sued out this writ of error.

Joseph B. Batchelor and Edward Graham Haywood for the plaintiff in error.

A. W. Tourgee, contra.

Swayne, J. * * * The only federal question presented by the record is, whether the exemption was valid as regards contracts made before the adoption of the constitution of 1868.

The counsel for the plaintiff in error insists upon the negative of this proposition. The counsel upon the other side, frankly conceding several minor points, maintains the affirmative view. Our remarks will be confined to this subject.

The constitution of the United States declares that "no state shall pass any . . . law impairing the obligation of contracts."

A contract is the agreement of minds, upon a sufficient consideration, [*600] that something specified shall be done, or shall not be done.

The lexical definition of "impair" is "to make worse; to diminish in quantity, value, excellence, or strength; to lessen in power; to weaken; to enfeeble; to deteriorate." Webster's Dict.

"Obligation" is defined to be "the act of obliging or binding; that which obligates; the binding power of a vow, promise, oath, or contract," &c. Id.

"The word is derived from the Latin word *obligato*, tying

up; and that from the verb *obligo*, to bind or tie up; to engage by the ties of a promise or oath, or form of law; and *obligo* is compounded of the verb *ligo*, to tie or bind fast, and the preposition *ob*, which is prefixed to increase its meaning." *Blair v. Williams* and *Lapsley v. Brashears*, 4 Litt. (Ky.) 65.

The obligation of a contract includes every thing within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it, the contract, as such, in the view of the law, ceases to be, and falls into the class of those "imperfect obligations," as they are termed, which depend for their fulfilment upon the will and conscience of those upon whom they rest. The ideas of right and remedy are inseparable. "Want of right and want of remedy are the same thing." 1 Bac. Abr., tit. Actions in General, letter B.

In *Von Hoffman v. City of Quincy* (4 Wall. 535), it was said: "A statute of frauds embracing pre-existing parol contracts not before required to be in writing would affect its validity. A statute declaring that the word 'ton' should, in prior as well as subsequent contracts, be held to mean half or double the weight before prescribed, would affect its construction. A statute providing that a previous contract of indebtedment may be extinguished by a process of bankruptcy would involve its discharge; and a statute forbidding the sale of any of the debtor's property under a judgment upon such a contract would relate to the remedy."

It cannot be doubted, either upon principle or authority, that each of such laws would violate the obligation of the contract, [*601] and the last not less than the first. These propositions seem to us too clear to require discussion. It is also the settled doctrine of this court, that the laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This rule embraces alike those which affect its validity, construction, discharge, and enforcement. *Von Hoffman v. City of Quincy*, *supra*; *McCracken v. Hayward*, 2 How. 608.

In *Green v. Biddle* (8 Wheat. 1), this court said, touching the point here under consideration: "It is no answer, that the acts

of Kentucky now in question are regulations of the remedy, and not of the right to the lands. If these acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they overturned his rights and interests."

"One of the tests that a contract has been impaired is, that its value has by legislation been diminished. It is not by the constitution to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation,—dispensing with any part of its force." *Planters' Bank v. Sharp et al.*, 6 How. 301.

It is to be understood that the encroachment thus denounced must be material. If it be not material, it will be regarded as of no account.

These rules are axioms in the jurisprudence of this court. We think they rest upon a solid foundation. Do they not cover this case; and are they not decisive of the question before us?

We will, however, further examine the subject.

It is the established law of North Carolina that stay laws are void, because they are in conflict with the national constitution. *Jacobs v. Smallwood*, 63 N. C. 112; *Jones v. Crittenden*, 1 Law Repos. (N. C.) 385; *Barnes v. Barnes et al.*, 8 Jones L. (N. C.) 366. This ruling is clearly correct. Such laws change a term of the contract by postponing the time of payment. This impairs its obligation, by making it less valuable to the creditor. But it does this solely by operating on the remedy. The contract is not otherwise touched by the offending law. Let us suppose a case. A party recovers two judgments, [*602]—one against A., the other against B.,—each for the sum of \$1,500, upon a promissory note. Each debtor has property worth the amount of the judgment, and no more. The legislature thereafter passes a law declaring that all past and future judgments shall be collected "in four equal annual installments." At the same time, another law is passed, which exempts from execution the debtor's property to the amount of \$1,500. The court holds the former law void and the latter valid. Is not such a result a legal solecism? Can the two judgments be reconciled? One law postpones the remedy, the other

destroys it; except in the contingency that the debtor shall acquire more property,—a thing that may not occur, and that cannot occur if he die before the acquisition is made. Both laws involve the same principle and rest on the same basis. They must stand or fall together. The concession that the former is invalid cuts away the foundation from under the latter. If a state may stay the remedy for one fixed period, however short, it may for another, however long. And if it may exempt property to the amount here in question, it may do so to any amount. This, as regards the mode of impairment we are considering, would annul the inhibition of the constitution, and set at naught the salutary restriction it was intended to impose. * * *

Imprisonment for debt is a relic of ancient barbarism. Cooper's *Justinian*, 658; 12 *Tables*, Tab. 3. It has descended with the stream of time. It is a punishment rather than a remedy. It is right for fraud, but wrong for misfortune. It breaks the spirit of the honest debtor, destroys his credit, which is a form of capital, and dooms him, while it lasts, to helpless idleness. Where there is no fraud, it is the opposite of a remedy. Every right-minded man must rejoice when such a blot is removed from the statute-book.

But upon the power of a state, even in this class of cases, [*603] see the strong dissenting opinion of Mr. Justice Washington, in *Mason v. Haile*, 12 *Wheat.* 370.

Statutes of limitation are statutes of repose. They are necessary to the welfare of society. The lapse of time constantly carries with it the means of proof. The public as well as individuals are interested in the principle upon which they proceed. They do not impair the remedy, but only require its application within the time specified. If the period limited be unreasonably short, and designed to defeat the remedy upon pre-existing contracts, which was part of their obligation, we should pronounce the statute void. Otherwise, we should abdicate the performance of one of our most important duties. * * * [*607] * * *

We think the views we have expressed carry out the intent of contracts and the intent of the constitution. The obligation of the former is placed under the safeguard of the latter. No

state can invade it; and Congress is incompetent to authorize such invasion. Its position is impregnable, and will be so while the organic law of the nation remains as it is. The trust touching the subject with which this court is charged is one of magnitude and delicacy. We must always be careful to see that there is neither nonfeasance or misfeasance on our part.

The importance of the point involved in this controversy induces us to restate succinctly the conclusions at which we have arrived, and which will be the ground of our judgment.

The remedy subsisting in a state when and where a contract is made and is to be performed is a part of its obligation, and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the constitution, and is, therefore, void.

The judgment of the supreme court of North Carolina will be reversed, and the cause will be remanded with directions to proceed in conformity to this opinion; and it is

So ordered.

Clifford and Hunt, JJ., concurred in the judgment. *Harlan, J.*, dissented.

The doctrine announced in this case is now well established; and expressions to the contrary, many of which will be found in the earlier state reports, are of small practical importance, since this federal question is sufficient to take the case from the supreme court of any state to the supreme court of the United States, where the decision will be reversed if a law impairing the remedy has been sustained as to pre-existing contracts.

An Early View. In *Sturges v. Crowninshield*, 4 Wheaton, at page 200, Marshall, C.J., said: "The distinction between the obligation of a contract and the remedy given by the legislature to enforce that obligation has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct. Confinement of the debtor may be a punishment for not performing his contract, or may be allowed as a means of inducing him to perform it. But the state may refuse to inflict this punishment, or may withhold this means and leave the contract in full force. Imprisonment is no part of the contract and simply to release the prisoner does not impair its obligation."

HEINEMAN v. SCHLOSS.

83 Michigan 153, 47 N. W. 107. (1890)

Changing Form of Remedy Without Affecting Substance—Retrospective Laws.

Garnishment by Emil S. Heineman et al., against Seligman Schloss et al., as garnishees of Rachel Solomon, judgment defendant. From judgment on verdict directed in discharge of the garnishees plaintiffs bring error. Reversed.

Plaintiffs sought to charge the garnishees for the proceeds of a stock of goods mortgaged to the garnishees in 1888, and, as plaintiffs allege, to defraud the principal defendant's creditors.

This court held in *Folkerts v. Standish*, 55 Mich. 463, that a garnishee was not liable for the proceeds of property fraudulently received and converted into money, but afterward an act was passed declaring the garnishee chargeable for such proceeds. Acts of 1889 No. 244. Other facts appear in the opinion of the court.

Dickinson, Thurber & Stevenson for appellants.

Julian G. Dickinson for garnishees.

The Court by Cahill, J. * * * It is insisted on behalf of the defendants that to apply the statute of 1889 to this action would be to give it retroactive effect; that there is nothing upon the face of the act indicating that it was intended to have such effect; and that the rule is that all statutes are prospective in their operation, except where a contrary intention is clearly evidenced by the statute itself. The rule contended for by the defendants' counsel is correct, but it does not apply to this case. That rule could have been appealed to in defense of the original garnishee proceeding that was commenced February 7, 1889, because that suit was commenced before the act of 1889 had taken effect. But the garnishee law is purely a remedial statute. It gives no rights and creates no liabilities. Everything that can be accomplished by means of it could have been accomplished by other means if the garnishee law had never been passed. Counsel for defendants says:

"Under the mortgage, defendants' sale of the property was

valid under the law as far as plaintiffs are concerned. Could the legislature, by the amendatory enactment, give the plaintiffs a claim upon such property or its value, and make defendants liable therefor?"

The trouble with this inquiry is that it does not correctly state the situation of the defendants with reference to this property. If the mortgage under which they took the property was fraudulent, the mortgagees obtained no rights under it, and could not lawfully exercise any rights, as mortgagees, over the property under it. The funds received by them on a sale of the property remained in their hands as equitable assets for the benefit of the creditors of the mortgagor. Under the statute, as it existed prior to the amendment of 1889, this fund could not be reached by garnishment, but it was liable to be reached [*158] in equity. The effect of the amendment is not to enlarge the liability of the defendants, but to render them liable at law instead of in equity, as formerly. Treating the garnishee statute, then, as one affecting the *remedy* merely, it is not giving the statute of 1889 retroactive effect to apply it to suits commenced after the act took effect, simply because the transaction upon which the suit is based took place before that time.

In determining whether a statute is retroactive in its effect, regard must be paid to the purpose of it. If the statute is one that confers new rights or creates new liabilities, then to apply it to past transactions, so that new rights and liabilities spring up where none existed when such transactions occurred, is to give it retroactive effect; but when the statute is one giving a new or different remedy for a pre-existing right or liability, then it is not retroactive, as applied to suits commenced after the act has taken effect, because past transactions are involved in such suit. In the latter case the statute does not relate to or attempt to characterize transactions, but gives a certain remedy therefor, and the remedy may be pursued at once after the act takes effect.

The judgment is reversed, and a new trial granted.

To same effect see *Fisher v. Hervey*, 6 Colo. 16, and on the general subject of this topic see 10 Century Digest, title, Constitutional Law, §§ 174-535, and cases there cited.

2. THE POWER OF THE COURT AND JUDGE TO CONTROL THE WRITS.

On the general question of jurisdiction prepare again on the cases under that head, especially: *Hoagland v. Creed*, ante, 13; *Cooper v. Reynolds*, ante, 15; and *Windsor v. McVeigh*, ante, 38. As to acting without notice compare *Balch v. Shaw*, ante, 81.

COMMONWEALTH v. MAGEE.

8 Pennsylvania St. 240. (1848)

Power of Courts Over Their Processes—Jurisdiction of Judge at Chambers—Proper Practice Concerning Motions and Interlocutory Orders—Duty of Officer to Notify Creditor of Proceedings in the Case—Duty to Obey Orders of the Court—Diligence Required in Execution and Return of Process.

Debt on official bond by the commonwealth for the use of L. G. Brandebury and G. Klink against Alexander Magee, late sheriff of Perry county, and his sureties, to recover the amount of a *fi. fa.* given him for collection. From judgment for defendants plaintiff brings error. Affirmed.

The *fi. fa.* in question was issued and given to the sheriff April 9, 1844, returnable at the August term. At the time the writ was given to the sheriff, the defendant had plenty of property liable; but the sheriff had taken no action under the writ when the judge at chambers made an order in the cause, "May 4th, 1844, in the above case proceedings stayed until the 2nd day of the August Term ensuing this date. John Judkin." Aug. 7th, 1844, a *fi. fa.* was issued on a judgment of John Conrad against the common debtor and on this *fi. fa.* all of the debtor's property was sold

Brandebury, for plaintiff, contended, (1) that the order was *coram non judice*, and no protection to the sheriff, (2) at all events the sheriff became liable by his failure to make return and by concealing the order till he had sold the defendant's property on junior executions.

Reed, contra.

The Court by Bell, J. It is true a sheriff must use due diligence to levy and make the money demanded by an execution

placed in his hands. What will amount to due diligence must necessarily vary with the circumstances of each case; but it may be safely affirmed that when there are no peculiar reasons known to the sheriff calling for the exertion of unusual energy, and no special request by the plaintiff or his agent for immediate action, a delay such as occurred here before the delivery of the judge's order of the 4th of May, in the absence of collusion or fraud, will not be deemed *laches* to fix the officer for loss of the debt. Indeed, no fact is suggested on the record tending to show that the lapse of time that intervened between the delivery of the writ and the making of the order, endangered the plaintiff's demand. The execution which eventually swept the goods of the defendant, Ernest, was not issued until long after, and its success was consequent, not on the delay of the sheriff, but incidentally upon the legal effect of the judge's interference.

The inquiry is thus reduced to the single question, whether his order to stay proceedings was obligatory on the sheriff, or a nullity, commanding neither respect nor obedience.

The authority that a judge exercises at chambers in a cause pending, is the authority of the court itself. *Doe dem. Prescott v. Roe*, 9 Bing. (Eng.) 104, 2 Moore & S. 119, 1 Dowl. P. C. 274. And it may be enforced by attachment issued by the court, for the reason that disobedience of a judge's order is a contempt of the court, and punishable as such.

It is said, that, upon any other principle than that of delegated authority, it would be difficult to demonstrate the validity of many of the acts done by judges in cases and under circumstances in which the legislature has not specially invested them with power, in their individual capacities. This species of jurisdiction is exercised *ex necessitate rei* to prevent injustice and oppression, and to facilitate and direct the interlocutory proceedings of suits at law. It consequently embraces a variety of subjects more or less important to a proper administration of justice. Some of them are of course; and the administration of others calls for the exertion of a sound judgment and discretion. It is properly, therefore, under the control of the court from which the authority is derived, and to which a dissatisfied party is at liberty to appeal. Among the

subjects which reasonably fall within the circle of this jurisdiction, the power of staying an execution issued in vacation has been repeatedly recognized and acted on. Such an authority to be exercised by a single judge, is [*247] indeed necessary to prevent oppression, and to prohibit the undue sacrifice of property illegally levied. For these purposes it should be liberally, though cautiously, exercised. There can exist, therefore, no doubt that a judge of the court of common pleas possesses authority to make such an order as is complained of here, and, when properly made, that it is obligatory on the officer to whom it is addressed. But while this is conceded, it is insisted that the order under consideration was *coram non judice*, and void for want of previous notice to the plaintiffs in the execution. It is very true that the proper mode of proceeding in most cases is by summons, in the nature of a rule *nisi*, fixing a day for a hearing, and served on the opposite party. Without this the judge ought not to interfere, unless, indeed, the order or direction sought is of course. When the order is made, notice of it should be given to the party to be affected by it; otherwise he is at liberty to disregard it. Bagly's Prac. 15 et seq. But notice is not always necessary, for in some cases an order may be without summons. Nor is the omission of it fatal to the validity of the proceeding, *ab initio*, in any case. Though it is highly proper, and indeed indispensable, to correct practice, a neglect to give it is but an irregularity which, upon application, would furnish a sufficient ground to rescind the order made, but would not justify the officer's refusal to obey it. The power of acting residing in the judge, it is no part of the sheriff's business to inquire whether it has been executed in an orderly manner, or to determine how far the steps properly precedent to the order have been taken. In this respect, the fiat at chambers is analagous to a writ, which the sheriff is bound to execute, though it be irregular; the distinction being between process voidable for irregularity, and process void by lack of jurisdiction of the subject.

Nor was it the duty of the sheriff to notify the plaintiffs in the execution, of the receipt of the judge's order. He was justified in presuming that all had been rightly acted; and could not with propriety, or for any purpose of legal effect, inquire further. Some

degree of diligence was due from the plaintiffs; and an application from them to the judge, would doubtless have procured a recision, or at least a modification of the order, by the annexation of a condition preservative of their priority of lien. *Clark v. Manns*, 1 Dowl. P. C. (Eng.) 656; Bagly's Prac. 29. Either of these courses was within the power of the judge. The first would probably have been pursued, had he, on inquiry after summons, been satisfied his order was irregular and improperly obtained. The latter might have been effected by a direction to stay proceedings, after levy [*248] made, the levy to remain as security. But lacking any motion of this sort, it certainly lies not in the mouths of the plaintiffs to impeach the sheriff of misfeasance in the non-execution of the *fiery facias*. His hands, as we have seen, were tied. It is not enough to aver the plaintiffs knew nothing of the order, and could therefore take no steps for its abrogation or amendment. The answer is, they might have known it, had they inquired of the sheriff touching the non-execution of the writ, an inquiry as commonly made as it is natural. That they did not do this, is their misfortune, if not their fault; the consequences of which are not to be visited upon the officer, who is in no default. The truth is, the inceptive error was committed by the judge; first, in acting upon an *ex parte* hearing, and next, in granting an unconditional order, without respect to the rights of the plaintiffs. The results of this mistake, in this particular case, ought to warn the associate judges of the commonwealth, who are not expected to be learned in matters of law, against a similar interference with process, without an opportunity first given to the antagonist party to be heard. The English mode of procedure in such cases is clearly pointed out in Bagly's Practice, at Chambers, cap. 1, and being well calculated to protect the rights and interests of all parties, should be followed, here, as closely as possible.

The inquiry recurs, what was the effect of the judge's order? Certainly to hang up the execution until after the return day. Its functions were thus suspended until, by the lapse of time, its vitality was extinguished. Beyond the return day, its operation and vigor could only have been preserved by an actual levy; or rather, the effect of the levy being to place the goods *in gremio legis*, they

would have so remained for satisfaction of the plaintiffs' execution, unless released by their consent or misconduct, or by operation of law. But a levy under the first execution being wanting, it had no hold on the goods after the return day. Consequently, the second execution was the only effective one in the hands of the sheriff at the time of the sale of the goods. The proceeds were therefore properly applied in satisfaction of it. * * * [*249]

Judgment affirmed.

The court's power of control over its process as stated is recognized everywhere (8 Ency. Pl. & Pr. 460), but the powers of a judge at chambers is a more vexed question. Clearly without statute he has no power in vacation to render judgments or to set them aside. *Fisk v. Thorp*, 51 Neb. 1; 4 Ency. Pl. & Pr. 347. But power of control over process of the court stands on different ground, for often delay till the next term of court would work irreparable injury. Therefore, though the judge at chambers probably has no power to quash the execution (*Freeman v. Dawson*, 110 U. S. 264), it seems clear that he may stay it till the question can be heard in court. See *Freeman on Ex.*, § 32. See also *Lockhart v. McElroy*, 4 Ala. 572; *Sanchez v. Carriaga*, 31 Cal. 170.

This is a strong case in favor of the sheriff, as to the time within which he must levy. See *Albrecht v. Long*, post, p. 333, and notes; also 22 Am. & Eng. Ency. L. (1st Ed.) 542.

3. THE OFFICER'S RIGHTS AND LIABILITIES IN EXECUTING WRITS.

a. Their Right to Protection and Indemnity.

Under this head prepare again: *Keniston v. Little*, ante, 231; *Stanley v. Nutter*, ante, 186; *Abercrombie's Adm'r. v. Chandler*, ante, 184; and *Commonwealth v. Magee*, ante, 307.

HAMNER v. BALLANTYNE.

13 Utah 324, 44 Pac. Rep. 704, 57 Am. St. Rep. 736. (1896)

Sheriffs—Liability for Official Acts—What Writs Protect—Nature of Protection.

Action by John Hamner against Thomas Ballantyne. Judgment for plaintiff. Defendant appeals. Reversed.

J. W. Judd, for appellant.

Evans & Rogers, for appellees.

The Court by Zane, C. J. This is an appeal by the defendant from a judgment against him, in favor of the plaintiff, for the sum of \$268.50 and for costs, and from an order refusing a motion for a new trial. With other facts, the plaintiff alleged, in his complaint, that he was the owner of \$242.85, and that the defendant carried it away, and unlawfully converted it to his own use, to plaintiff's damage in the sum of \$242.85, with interest. To this complaint the defendant filed an answer, in which he justified such taking and conversion under an execution, which he made a part thereof. The execution recites a judgment against the defendants, John Hamner and others, and appears to be fair on its face. The defendant stated further, in his answer, that, in obedience to the execution, he demanded the amount due thereon, and that plaintiff paid to him the \$242.85 in satisfaction thereof, and that he returned said sum, with the execution and his return thereon, to the clerk's office. The execution and return thereon established the above facts, with the additional one that the \$242.85, less the costs, were paid to Hamner's attorney.

On the trial of the cause the defendant offered the execution [*329] with the return thereon in evidence, and the court having sustained the plaintiff's objection to its admission, defendant excepted, and assigns such refusal as error. This assignment of error raises the question, was the execution admissible in evidence, without the judgment upon which it issued? The writ required the officer to demand of the defendants the sum mentioned in it, and, upon refusal to pay, to levy upon and sell enough of their unexempted personal property to satisfy the same, and, if enough could not be found, to levy upon and sell enough unexempted real property. In demanding and receiving the money due on the execution, and crediting the same, the officer obeyed the commands of the writ, and he was protected by the writ in so doing. An officer with an execution in his hands is not authorized to demand payment from a person not a party to it, or to levy on the property of any other person. If he levies on property in the possession of a person, not a party who claims a right to it, he must produce the judgment with the execution under a plea of justification; because possession is *prima facie* evidence of ownership. The officer is apprised, by the possession and the claim, that the person making it has the *prima facie* right according to his claim. However, we do not wish to be understood as holding that an officer would be justified in executing a writ against a person named in it as a defendant who was not a party to the judgment upon which it issued, or in executing a writ issued on a void judgment, after learning that such person was not a party to the judgment or that it was void or that there was no judgment. With such knowledge, we are of the opinion that the officer should not execute the writ. *Grace v. Mitchell*, 31 Wis. 533, 11 Am. Rep. 613; *Sprague v. Birchard*, 1 Wis. 457, 60 Am. Dec. 393; *McDonald v. Wilkie*, 13 Ill. 22, 54 Am. Dec. 423; *Leachman v. Dougherty*, 81 Ill. 325. There is a conflict in the authorities, however, as to this [*330] rule, but we think it sustained by authority and better reasoning. *Freem. Ex'ns.* (2d Ed.) §102. But we cannot apply this rule to this case, because knowledge that the plaintiff was not a party to the judgment upon

which the execution issued is not sufficiently shown by the evidence in the record. Notice of any irregularity or fraud in obtaining the judgment, or in the judgment itself, that simply renders it voidable, but not void, will not justify the officer in refusing to execute the writ, or render its execution by him wrongful, or make him liable for its execution. In that case, the judgment would be effectual until set aside, and such action must be left to the party whose rights are invaded.

The plaintiff claims that the issue tried in the court below between defendant and himself was simply a right to property; that the officer was not proceeded against as a tortfeasor. When the proceeding is one *in rem*, as in the case of an action of replevin, the better rule is that the officer, in justifying, must show a valid judgment as the foundation of the action, although the writ may be fair on its face, and he has no information that it has been issued on a judgment void for want of jurisdiction of the subject-matter or of the person, or without any judgment upon which to base it. If an officer in good faith executes a writ, fair on its face, the writ protects him, though there was no judgment upon which to base it. Such a writ can only be used as a weapon of defence, and for protection,—not for the purpose of attack for offensive purposes. An officer, who in good faith seizes or sells property under an execution, may justify, in a suit for damages against him in consequence of such seizure or sale, without producing the judgment; and he will be regarded as having acted in good faith, when the writ was fair on its face, and he was not advised that there was no judgment, or [*331] that, if there was, it was void. And it will make no difference whether the suit is for damages on an implied contract or upon a tort. A ministerial officer cannot be held personally liable in any proceeding, civil or criminal, for any act done by him in executing a writ fair on its face, unless he knows, or should have known, as a reasonable man, that the judgment upon which it purported to have been issued was void, or that there was no judgment. In the trial of the title or right to property in the officer's hands under the writ, he must, however, produce the judgment, though the writ is fair upon its face, and he has no knowledge that the judg-

ment is void, or that there is none. Such a proceeding is against the property, or to recover it, and not to subject the officer to responsibility for his acts in obedience to the mandate of the court. *Beach v. Botsford*, 1 Doug. (Mich.) 199, 40 Am. Dec. 45; *Gidday v. Witherspoon*, 35 Mich. 368; *Cobbey*, Repl. §§ 806, 807; *Cooley*, Torts (2d Ed.) 542; *Leroy v. East Saginaw City Ry. Co.*, 18 Mich. 233, 100 Am. Dec. 162; *Adams v. Hubbard*, 30 Mich. 104.

The plaintiff alleged, in his complaint, that the defendant took \$242.85 of his money and unlawfully converted it to his own use. The plaintiff was a party defendant to the execution under which the officer, who is the defendant in this case, took the money; and the writ purported to be on a judgment against the plaintiff in this case, and was fair on its face; and the evidence does not show that the defendant knew that the judgment was void or that no judgment had been rendered against the plaintiff; and this case was not instituted to recover the specific money taken by the officer. It was brought to recover damages for the unlawful conversion of the money by the officer to his own use. If the plaintiff had waived the tort alleged, and sued for money had and received by the officer to plaintiff's use, [*332] it would not have been an action to try the title or right to the money merely. The effect of a judgment against the officer in that case would have made him personally responsible for acts performed, in good faith, on an execution against a defendant to it; but, as we have seen, the execution protected the officer for such acts, under such circumstances. While the former distinctions between civil actions in this state have been abolished, they will be regarded still as founded upon contract or tort from the facts alleged in the complaint. Actions in this state are classified with respect to the facts alleged. From the facts alleged, this action must be regarded as in trover. While in some cases the person whose property has been unlawfully converted into money or money's worth may waive the tort, and base his action on an implied contract for money had and received, the plaintiff based this one on the wrongful conversion of his money by the defendant. The action is not for the identical money which he alleges was con-

verted, but he claims damages for the wrongful conversion of his money. The execution, being fair on its face, justified the conversion as the return shows it was made. The action could not be regarded as one to try the right to the money taken that had been paid to defendant's attorney before the suit was brought. It was for damages resulting to plaintiff, as claimed, from the wrongful and unlawful conversion of his own money by the defendant.

In sustaining plaintiff's objection to the execution offered in evidence by the defendant, we are disposed to think that the court below erred. The judgment and order appealed from are reversed, and the court below is directed to grant a new trial.

Bartch, J., concurs. [**333*].

Miner, J. I concur, except that I am of the opinion that, in a case of trover, where the execution is fair and regular on its face, and issued by a court having jurisdiction, the officer would be protected by it, and cannot be held liable for its execution in a proper manner, even if he knew of irregularities or defects in the proceedings attending the issuing of the execution. See *Marks v. Sullivan*, 9 Utah 12, 33 Pac. 224, and cases referred to. See also *Matthews v. Densmore*, 109 U.S. 216, 3 Sup. Ct. 126.

BURTON v. WILKINSON.

18 Vermont 186, 46 Am. Dec. 145. (1846)

**Service of Process by Special Deputy—At Night—Proof of Authority—
Demanding Admittance, of Whom—Right to Break Into Dwell-
ing or Barn—For Stranger's Concealed Goods.**

Trespass quare clausum fregit by Albert S. and Oscar A. Burton against Curtis Wilkinson and L. H. Nutting, alleging that defendants, on Oct. 17th, 1842, broke open plaintiffs' warehouse and took butter belonging to the plaintiffs. Defendants pleaded in justification, that Wilkinson, as a specially authorized officer, and Nutting, his servant, took the butter on an attachment against one Cutter, having demanded the keys before breaking the door open. Then plaintiffs rejoined that the butter belonged, not to Cutter, but to one Houghton, for whom plaintiffs held. Defendants rebutted that Houghton had sued them for the taking, and judg-

ment had been rendered against him. To this plaintiffs demurred. The court overruled the demurrer and plaintiffs excepted. Affirmed.

H. R. & J. J. Beardsley, for plaintiffs.

Smalley, Adams & Hoyt and *Nutting & Hunt*, for defendants.

The Court by Williams, C. J. But two questions have presented themselves to the consideration of the court in this case. 1. As to the power of a person, specially deputed to serve a writ, in relation to the breaking of doors. 2. As to the claim set up by the plaintiffs under the title of Houghton.

A person deputed to serve a writ, as was the defendant Wilkinson, has all the powers which may be exercised by a sheriff in serving or executing any process, except that he is not to be recognized or obeyed as a sheriff, or known officer, but must show his authority, and make known his business, if required by the party who is to obey the same. In this particular he represents a special bailiff, rather than a known officer. To make an attachment, or to levy an execution on goods, the sheriff cannot break open the outer door of the debtor's dwelling house. It is otherwise, if the goods of a stranger are secreted in the dwelling house. A barn, or out-house, adjoining to and parcel of the house, or within the curtilage, may be broken open to make such levy; but a request must first be made for admittance. A barn in the field may be opened without request. *Penton v. Brown*, 1 Keble, 698; *Haggerty v. Wilber*, 16 Johns. 287. There is nothing to prevent a sheriff from serving an execution in the night, as well as in the day time. Wilkinson [*190] was therefore justified in breaking into the warehouse in question, to serve an attachment on the goods of any person therein;—but he must first demand admittance.

In this case it is stated, that he did demand admittance of the persons who had the key; but it is objected, that the plea does not state but that the persons who had the key, were wrongfully in possession. We think this was not necessary. If he demanded admittance of those who had the custody and care of the key, and who could have let him in without compelling him to resort to force, it was all that was necessary; and he was not bound to in-

quire how, or in what way, they became possessed of the same. A demand of the plaintiffs for admittance could have been of no use, as they could not have unlocked the door, while Bogue and Walker had the key. If there had been any collusion between the defendants and Bogue and Walker, which would have made the defendants liable, it should have appeared in the replication. A sheriff would have been justified in breaking open the warehouse of the plaintiffs to do execution on the goods of Cutter, having first demanded admittance of the person who had the key. * * *

The judgment of the county court is therefore affirmed.

The law as to forcing doors is accurately stated here. See Freeman on Ex. § 256. The leading case is *Seymayne's Case*, 5 Coke 91.

SMITH v. OSGOOD.

46 New Hampshire 178. (1865)

Trustee Process—Officer's Right to Indemnity—Right to Abandon if Not Indemnified—Rights of Junior Creditor Who Indemnifies—Liability of Officer for Failure to Return Process—When Proceeds of Sale May be Applied.

Trustee process by Smith against J. T. Osgood, principal debtor, and N. G. Ordway as his trustee. Abel Proctor & Son intervene as claimants. Case reserved for determination by the whole court. Trustee discharged.

Ordway seized some hemlock bark on several attachments against said Osgood, two in favor of Proctor & Son being the latest. Then Page claimed the bark, and Ordway demanded indemnity from the attaching creditors, but P. & Son were the only ones who gave it. Page then sued Ordway in *trover* for the value of the bark, which suit P. & Son successfully defended, without the aid of any of the other attaching creditors, all of whom knew of it. All of the attachment suits were prosecuted to judgment, executions thereon duly issued and delivered to Ordway, who then sold the bark thereon for \$403, which he had in his hands when this action was brought to charge him as trustee of Osgood therefor.

Flint and George, Foster & Sanborn, for plaintiff.

A. & F. A. Fowler, for trustee.

Morrison, Stanley & Clark, for claimants.

The Court by Sargent, J. Where an officer is requested to attach property on a writ, if the title is doubtful he may demand an indemnity of the creditor before attaching it, and if such indemnity is not given he is under no obligation to attach it. *Perkins v. Pitman*, 34 N. H. 261; *Bond v. Ward*, 7 Mass. 123. So where the officer is directed to arrest the body of a debtor, if he has doubts about the propriety of the arrest, he may demand a like indemnity, and unless he receive it he is not obliged to make the arrest. *Marsh v. Gold*, 19 Mass. (2 Pick.) 284, 290.

The question here arises, whether, after the officer has attached property on *mesne* process without any controversy about the title at the time, and he is afterwards proceeding to sell the same upon the writ, or upon the execution after judgment, and third persons then step in and claim the property and forbid the officer to sell the same, it is the duty of the officer to sell the property at his peril, or whether he may then demand of the creditor an indemnity, and refuse to sell unless such indemnity is given.

In this case it seems that all the executions were placed in the officer's hands within thirty days from the rendition of judgment, and if no indemnity had been claimed the property attached should have been applied in the order of the attachments. If the controversy as to the title had arisen in this case at the time of the attachment, and an indemnity had been demanded, there is no doubt that for the benefit of such creditors as gave the required indemnity, the officer must proceed and make the attachments in their order, and might decline to do anything for the others who did not give the indemnity, and we think the same rule should be applied in this case. We assume in this case, though the case is not quite explicit on that point, that the officer not only notified all the creditors, but that he made them understand fully the situation of the case, and demanded of them in terms the indemnity, and that they decided deliberately not to furnish the indemnity and risk the consequences. The officer should do this business so that there should be no room for misunderstanding or collusion. Page made his claim on the bark and insisted upon it, and brought his suit against the officer. These claimants gave the indemnity which the officer demanded. The other creditors did not. It would

hardly be equitable now that the other creditors, who have stood by and neither given any indemnity nor assisted in the defense of the suit against the officer, should receive the whole benefit of the claimants' industry and money in defending that suit, and of their indemnifying bond, while the claimants themselves get nothing for their trouble and expense, nor any part of their claim, [*180] while those who incurred no liability and who did nothing, get the whole.

We think, in this case, if no one had indemnified, the officer might properly have refused to sell, and all the creditors would have been estopped to sue the officer, so far at least as the property claimed by Page was concerned, and that, as it was, he was only obliged to sell such property on the claimants' execution. No question is here raised concerning the application of any surplus after paying claimants' debt, for the case finds that the avails of the whole bark are not sufficient to pay the first execution of these claimants.

But the plaintiff claims that, because the officer did not make the application upon the execution at the time, he cannot now do so, but that the money belongs to Osgood, the principal defendant, and can be held in this suit in the hands of the officer as trustee. But we cannot so regard it. If the property in this case had been delivered to a receiver, who had refused to deliver it on demand, and, after execution was recovered, the officer had brought suit on the receipt, and had after a long time recovered, and suppose he had kept his execution till the termination of the suit, though long after the return day of the execution, could he not be allowed to apply the property on the execution? It might have been the more proper course for the officer in each case to return his execution on the return day, making return of whatever he had done up to that time, and take a new one on which to make a future return. In this case the officer delayed from uncertainty as to which execution he should make the application upon. He should perhaps have returned them with his doings, and asked directions from the court as to the application of the money. But this suit was soon brought in which the officer's liability would be settled, and he has waited till now. We think he may now make the application, and

that no one but the creditor can complain of the delay, who is the claimant in this case.

Trustee discharged.

A constable sued for releasing goods for want of indemnity after expressing satisfaction with the indemnity given, is liable. "If, as the constable said, property in the goods was claimed by another, he was not bound to proceed unless sufficient indemnity was given; but having demanded and accepted indemnity, the situation of affairs is entirely altered. He is compelled on his part to proceed to a sale of the goods, and must look to his bond for indemnity." *Corson v. Hunt*, 14 Pa. St. 510, 53 Am. Dec. 368.

NELSON v. COOK.

17 Illinois 443. (1856)

Creditor's Liability for Officer's Tort—Contribution Between Tortfeasors—Principal's Liability to Indemnity Agent, Reasons for and Limitations of Rule—Effect of Effort to Sustain Levy—Effect of Special Directions.

Assumpsit commenced by attachment by Isaac Cook, late sheriff of Cook county, against John G. Nelson and others, to recover damages paid by said Cook on judgment against him in favor of the owners of property taken by Cook's deputy on execution in favor of said Nelson et al. on their judgment against A. E. Miller and D. R. Clements. From judgment for plaintiff defendants bring error. Reversed.

C. Beckwith, Williams and Woodbridge, for appellants.

Burton and Winston, for appellee.

The Court by Scates, C. J. The principle laid down in *Merryweather v. Nixan*, 8 Term 186, that there is no right of contribution as between tort-feasors, or trespassers, has been and still is, recognized as unquestionable law. But this does not affect the right of indemnity where a right of indemnity exists.

There has been some little diversity of opinion, in the proper application of the rule of distinction, or exception to the general rule, in *Merryweather v. Nixan*, in agreeing upon the facts and circumstances, which raise the exception. I regard the following distinctions, however, to be well settled and supported by authority. Where a party is employed in his usual course of business, as an auctioneer or warehouseman, to sell or deliver goods, by one claiming to have right so to do, and the contrary is not known to

the employee, he may have an action for an implied promise of indemnity, for the damages he may be compelled to pay to the true owner, for the trespass or conversion committed by such sale or delivery. *Betts v. Gibbons*, 2 Ad. & El. 57, 29 Eng. C. L. 37; *Adamson v. Jarvis*, 4 Bingh. R. 66, 13 Eng. C. L. 403; Story on Agency, § 339.

But where one is employed or directed to do or commit a known crime, misdemeanor, trespass or wrong, and the employee or agent knows it to be such, an express promise of indemnity is void, being against the peace and policy of the law. Story on Agency, § 329; Broom's Leg. Max. 328, 329; *Holman v. Johnson*, 1 Cowp. (Eng.) 341; *Coventry v. Barton*, 17 John. (N. Y.) 142.

Yet, where the question of title to the property is one of doubt, controversy or uncertainty, or the act to be done is not an apparent wrong, and the person or agent employed or directed to do the act, does not know that it is a wrong or trespass; in such case he may sue and recover indemnity from his employer, upon an implied assumption to save him harmless for the act. See authorities last above, and note to *Farebrother v. Ansley*, 1 Campb. 343; *Gower v. Emery*, 18 Me. 79, 83.

This relation, however, of principal and agent, or employee, is not raised by the simple delivery of a writ of *capias*, attachment, *fiery facias* and the like, to the officer, or his deputy. There is no implication of indemnity for their trespasses and wrongs in the execution, or attempt to execute process put into their hands, without any specific direction to do particular acts, or take particular goods under it. This is illustrated as between the sheriff and his deputy, in the case of *Farebrother v. Ansley*, 1 Campb. 343; and in relation to the liability of plaintiffs in process to the sheriff, by *Wilson v. Milner*, 2 Campb. 452; *England v. Clark*, 5 Ill. (4 Scam.) 486; *Coventry v. Barton*, 17 [*450] John. 142; *Averill v. Williams*, 1 Denio (N. Y.) 502; *Humphreys v. Pratt*, 2 Dow. & Clark (Eng.) 288, 5 Bligh N. S. 154; referred to in 6 M. & W. Ex. R. note 387; *Marshall v. Hosmer*, 4 Mass. 60; *Bond v. Ward*, 7 Mass. 123; *Avery v. Halsey*, 14 Pick. (Mass.) 174; *Fitler v. Fossard*, 7 Pa. St. 540; *Saunders v. Harris*, 4 Humph. (Tenn.) 72. The facts in *Gower v. Emery*, 18 Me. 79, show a special direc-

tion, or will justify its interference, and what the court say must be understood as upon the case before them.

Under these well settled principles, the defendant is not entitled to recover, upon an implied indemnity, nor without an express promise, or particular directions about the levy. Proof that plaintiffs endeavored to sustain the attachment upon the levy, is wholly insufficient for this purpose, and none other appears. Again, a recovery in trespass for taking, or in trover for converting chattels, followed by satisfaction, vests the property in the defendant: "*Solutio pretii emptionis loco habetur.*" *Adams v. Broughton*, 2 Strange 1078; *Cooper v. Shepherd*, 3 Mann. G. & S. 266, 54 Eng. C. L. 265.

Thus treating the sheriff as agent, in whom the property was vested by the recovery, for the benefit of the plaintiffs, his principals, he may forfeit his title to repayment of his advances and disbursement, by his own gross negligence, fraud or misconduct, and be excluded from all remedy against his principal. Story on Agency, § 348.

The defendant misapplied the property, and converted it to his own use by a sale and payment to another, of the proceeds.

Judgment reversed and cause remanded.

Judgment reversed.

If the judgment creditor expressly directed the levy on the specific property, which did not belong to the judgment debtor, he is liable to the owner in trover either jointly with the officer or alone. *Hale v. Ames*, 2 T. B. Mon. (Ky.) 143, and note to same case in 15 Am. Dec. 150. *Walker v. Wonderlick*, 33 Neb. 504, 50 N. W. 445.

LAMMON v. FEUSIER.

III United States 17. (1883)

Official Bond Construed—What Acts Are Colore Officii—Decisions Reviewed—Conflict of Jurisdiction, Property in Custodia Legis.

The original action was brought in the circuit court of the United States for the district of Nevada, by Henry Feusier, a citizen of California, against George I. Lammon and three other persons, citizens of Nevada, upon a bond given by Lammon, the marshal of the United States for that district, as principal, and by the other defendants as his sureties, and conditioned that Lam-

mon, "by himself and by his deputies, shall faithfully perform all the duties of the said office of marshal." [*18] It was alleged in the declaration and found by the court (trial by jury having been duly waived) that Lammon, while marshal, and while the bond was in force, having in his hands a writ of attachment on mesne process against the property of one E. D. Feusier, levied it upon the goods of the plaintiff, a stranger to the writ. On the question of law, whether the taking of the plaintiff's property upon a writ of attachment against another person constituted a breach of official duty on Lammon's part for which his sureties were liable, the circuit judge and the district judge were opposed in opinion, and so certified. The plaintiff having died pending the suit, final judgment was rendered for his executors, in accordance with the opinion of the circuit judge and the defendants sued out this writ of error.

C. J. Hillyer, for appellant.

M. N. Stone, for appellee.

The Court by Gray, J. The bond sued on was given under § 783 of the Revised Statutes, which requires every marshal, before entering on the duties of his office, to give bonds with sureties for the faithful performance of those duties by himself and his deputies; and this action was brought under § 784, which authorizes any person, injured by a breach of the condition of the bond, to sue thereon in his own name and for his sole use.

The question presented by the record is whether the taking by the marshal upon a writ of attachment on mesne process against one person, of the goods of another, is a breach of the condition of his official bond, for which his sureties are liable.

The marshal, in serving a writ of attachment on mesne process, which directs him to take the property of a particular person, acts officially. His official duty is to take the property of that person, and of that person only; and to take only such property of his as is subject to be attached, and not property exempt by law from attachment. A neglect to take the attachable property of that person, and a taking, upon the writ, [*19] of the property of another person, or of property exempt from attachment, are equal breaches of his official duty. The taking of the attachable property of the

person named in the writ is rightful; the taking of the property of another person is wrongful; but each being done by the marshal, in executing the writ in his hands, is an attempt to perform his official duty, and is an official act.

A person other than the defendant named in the writ, whose property is wrongfully taken, may indeed sue the marshal, like any other wrongdoer, in an action of trespass, to recover damages for the wrongful taking; and neither the official character of the marshal, nor the writ of attachment, affords him any defence to such an action. *Day v. Gallup*, 69 U. S. (2 Wall.) 97; *Buck v. Colbath*, 70 U. S. (3 Wall.) 334.

But the remedy of a person, whose property is wrongfully taken by the marshal in officially executing his writ, is not limited to an action against him personally. His official bond is not made to the person in whose behalf the writ is issued, nor to any other individual, but to the government, for the indemnity of all persons injured by the official misconduct of himself or his deputies; and his bond may be put in suit by and for the benefit of any such person.

When a marshal, upon a writ of attachment on mesne process, takes property of a person not named in the writ, the property is in his official custody, and under the control of the court whose officer he is, and whose writ he is executing; and, according to the decisions of this court, the rightful owner cannot maintain an action of replevin against him, nor recover the property specifically in any way, except in the court from which the writ was issued. *Freeman v. Howe*, 65 U. S. (24 How.), 450; *Krippendorf v. Hyde*, 110 U. S. 276. The principle upon which those decisions are founded is, as declared by Mr. Justice Miller in *Buck v. Colbath*, above cited, "that whenever property has been seized by an officer of the court, by virtue of its process, the property is to be considered as in the custody of the court, and under its control for the time being; and that no other court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over [*20] the court whose process has first taken possession, or some superior jurisdiction in the premises." 3 Wall. 341. Because the law had been so settled by this court, the plaintiff in this case failed to maintain replevin in the

courts of the state of Nevada against the marshal, for the very taking which is the ground of the present action. *Feusier v. Lammon*, 6 Nev., 209.

For these reasons the court is of opinion that the taking of goods, upon a writ of attachment, into the custody of the marshal, as the officer of the court that issues the writ, is, whether the goods are the property of the defendant in the writ or of any other person, an official act, and therefore, if wrongful, a breach of the bond given by the marshal for the faithful performance of the duties of his office.

Under the analagous question, whether the sureties upon the official bond of a sheriff, a coroner, or a constable are responsible for his taking upon a writ, directing him to take the property of one person, the property of another, there has been some difference of opinion in the courts of the several states.

The view that the sureties are not liable in such a case has been maintained by decisions in the supreme courts of New York, New Jersey, North Carolina and Wisconsin, and perhaps receives support from decisions in Alabama, Mississippi and Indiana. *Ex parte Reed*, 4 Hill, (N. Y.) 572; *People v. Schuyler*, 5 Barb. Sup. (N. Y.) 166; *State v. Conover*, 28 N. J. L. (4 Dutcher), 224; *State v. Long*, 8 Iredell (N. Car.) 415; *State v. Brown*, 11 Iredell, 141; *Gerber v. Ackley*, 32 Wis. 233, 37 Wis. 43; *Governor v. Hancock*, 2 Ala. 728; *McElhaney v. Gilleland*, 30 Ala. 183; *Brown v. Moseley*, 11 Sm. & Marsh. (Miss.) 354; *Jenkins v. Lemonds*, 29 Ind. 294; *Carey v. State*, 34 Ind. 105.

But in *People v. Schuyler*, 4 N. Y. 173, the judgment in 5 Barb. 166 was reversed, and the case *Ex parte Reed*, 4 Hill, overruled by a majority of the New York court of appeals, with the concurrence of Chief Justice Bronson, who had taken part in deciding *Reed's* case. The final decision in *People v. Schuyler* has been since treated by the court of appeals as settling the law upon this point. *Mayor, etc., of New York v. Sibberns*, 3 Abbott App. 266, 7 Daly, 436; *Cumming v. Brown*, 43 N. Y. 514; *People v. Lucas*, 93 N. Y. 585. And the liability of the sureties in such cases has been affirmed by a great preponderance of authority, including decisions in the highest courts of Pennsylvania, Maine, Massachusetts, Ohio, Virginia, Kentucky, Missouri, Iowa, Ne-

braska, Texas and California, and in the supreme court of the District of Columbia. *Cormack v. Commonwealth*, 5 Binn. (Pa.) 184; *Brunott v. M'Kee*, 6 W. & S. (Pa.) 513; *Archer v. Noble*, 3 Me. 418; *Harris v. Hanson*, 11 Me. 241; *Greenfield v. Wilson*, 79 Mass. (13 Gray) 384; *Tracy v. Goodwin*, 87 Mass. (5 Allen,) 409; *State v. Jennings*, 4 Ohio St. 418; *Sangster v. Commonwealth*, 17 Grattan, (Va.) 124; *Commonwealth v. Stockton*, 5 T. B. Monroe, (Ky.) 192; *Jewell v. Mills*, 3 Bush. (Ky.) 62; *State v. Moore*, 19 Mo. 366; *State v. Fitzpatrick*, 64 Mo. 185; *Charles v. Haskins*, 11 Iowa, 329; *Turner v. Killian*, 12 Neb. 580; *Holliman v. Carroll*, 27 Texas, 23; *Van Pelt v. Littler*, 14 Cal. 194; *United States v. Hine*, 3 MacArthur, (D. C.) 27.

In *State v. Jennings*, above cited, Chief Justice Thurman said: "The authorities seem to us quite conclusive, that a seizure of the goods of A, under color of process against B, is official misconduct in the officer making the seizure; and it is a breach of the condition of his official bond, where that is that he will faithfully perform the duties of his office. The reason for this is that the trespass is not the act of a mere individual, but is perpetrated *colore officii*. If an officer, under color of a *fi. fa.* seizes property of the debtor that is exempt from execution, no one, I imagine, would deny that he had thereby broken the condition of his bond. Why should the law be different if, under color of the same process, he take the goods of a third person? If the exemption of the goods from the execution in the one case makes their seizure official misconduct, why should it not have the like effect in the other? True, it may sometimes be more difficult to ascertain the ownership of the goods, than to know whether a particular piece of property is exempt from execution; but this is not always the case, and if it were, it would not justify us in restricting to litigants the indemnity afforded by the official bond, thus leaving the rest of the community [*22] with no other indemnity against official misconduct than the responsibility of the officer might furnish." 4 Ohio St. 423.

So in *Lowell v. Parker*, 10 Met. 309, 313, a constable, authorized by statute to serve only writs of attachment in which the damages were laid at no more than \$70, took property upon a writ in which the damages were laid at a greater sum. In an action

upon his official bond, it was argued for the sureties that they were no more answerable than if he had acted without any writ. But Chief Justice Shaw, in delivering the opinion of the supreme judicial court of Massachusetts, overruling the objection, and giving judgment for the plaintiff, said: "He was an officer, had authority to attach goods on mesne process on a suitable writ, professed to have such process, and thereupon took the plaintiff's goods; that is, the goods of Bean, for whose use and benefit this action is brought, and who, therefore, may be called the plaintiff. He therefore took the goods *colore officii*, and though he had no sufficient warrant for taking them, yet he is responsible to third persons, because such taking was a breach of his official duty."

Upon the weight of authority, therefore, as well as upon principle, the judgment of the circuit court in the case at bar is right, and must be

Affirmed.

b. The Liability of Officer and Bond for Malfeasance, Misfeasance, and Nonfeasance.

Under this head review: *Michels v. Stork*, ante, 83; *Bacon v. Cropsey*, ante, 181; *Abercrombie v. Chandler*, ante, 184; *Stanley v. Nutter*, ante, 186; *Green v. Burke*, ante, 205; *Steele v. Thompson*, ante, 218; *State v. Herod*, ante, 221; *Morgan v. People*, ante, 221; *Daugherty v. Moon*, ante, 222; *Clarkson v. White*, ante, 226; *Keniston v. Little*, ante, 231; *Bostwick v. Benedict*, ante, 271; *People v. Dunning*, ante, 286; *Milburn v. State*, ante, 289; *Gordon v. Camp*, ante, 296; *Commonwealth v. Magee*, ante, 307; and all the cases under the last preceding topic.

KNOX v. WEBSTER.

18 Wisconsin 406, 86 Am. Dec. 779. (1864)

Executions—Modern American Rule as to When Lien Attaches—First Levy under Second Writ—Sale under Both—Liability of Officer—Who Entitled to Proceeds in Court—Right to Priority by Discovering Property.

Action by Thomas M. Knox against Webster as sheriff of Milwaukee county, for failure to levy plaintiff's execution before another subsequently placed in his hands. From judgment for

plaintiff defendant appeals. Affirmed. The main defense was that the other execution creditor found and showed the sheriff the property on which to levy and was entitled to priority for his diligence.

Butler & Cottrill, for appellant.

Knox, in person.

The Court by Dixon, C.J. "Personal property shall be bound from the time of its seizure on execution." R. S., ch. 134, § 18. Before seizure there is no lien—nothing by which the rights of different execution creditors, whether senior or junior, can attach. The lien takes effect from the date of the levy and by virtue thereof, and of course is confined to the execution levied, and can have relation to no other. Such lien is prior and superior to that of every execution subsequently levied, and consequently not liable to be defeated by such subsequent levy, though made upon a senior execution. This point, if not decided, was strongly intimated in *Russell v. Lawton*, 14 Wis. 209. It follows that the court was right in rejecting the record and proceedings upon the motion to have the money made on Cooper's execution applied on that of the plaintiff. The court had no power to make such application, and was bound to deny the motion. The plaintiff having wholly mistaken his remedy, the decision upon the motion was no bar to this suit, and that was the only purpose for which the record and proceedings were offered.

As to the duty of the sheriff in making the levy, we are [*410] satisfied he should have levied the senior execution first. The decision in *Russell v. Lawton* proceeded on this supposition in all cases where the several executions are in the hands of the same officer. The statute, § 15, requires the sheriff, under the sanction of his official oath, to indorse upon every execution the year, month, day and hour of the day when he received the same. No reason is perceived for this, unless it be to furnish unequivocal and satisfactory evidence upon which to determine disputed questions of priority and preference among different execution creditors of the same debtor, and to enable the sheriff to guard against mistakes. He is a public officer, of whom the law requires the strictest impartiality between those who are obliged to have his services,

and this impartiality cannot be enforced except upon the rule that he must, at his peril, levy and satisfy executions according to their seniority in his hands. Once allow it to be a race of diligence between the different creditors in finding and pointing out the property of the debtor, and what a door to partiality, fraud and strife would be opened! The sheriff might neglect inquiry, or be willfully ignorant, for the sake of favoring one or oppressing another creditor, and the whole controversy would be thrown upon the uncertain testimony of interested and suspicious witnesses. We do not doubt, therefore, that it was the intention of the legislature, as it is the course of reason, that executions should be levied according to seniority, and that the sheriff in this case was not justified in levying the junior execution first because the creditor in that execution had been more successful than himself in finding the property of the execution debtor. * * * [*411] * * *

Judgment affirmed. .

A junior creditor, learning that the sheriff had no special orders to levy but only to summon a garnishee on the senior fl. fa., ordered him to levy his fl. fa. on certain corn. Sheriff levied both writs at same time. The senior writ held entitled to priority, because it is the sheriff's duty to levy on any property without special orders. *Stuarts v. Reynolds*, 4 Harrington (Del.) 112. See also *Tomlinson v. Rowe*, Lator's Sup. to Hill & Denio (N. Y.) 410.

RUSSELL v. LAWTON.

14 Wisconsin 202, 80 Am. Dec. 769. (1861)

Same—Levy and Payment on Last Writ—How Far Sheriff and Deputy One Person—Notice to Deputy, Notice to Sheriff.

Action against sheriff. From judgment for plaintiff defendant appeals. Reversed.

Mat. H. Carpenter, for appellant.

J. H. Knowlton and Rockwell & Converse, for appellees.

The Court by Cole, J. * * * On the 9th day of February, 1859, the appellant as sheriff of Rock county, had delivered to him an execution in favor of the Bank of Beloit against the Racine and Mississippi Railroad Company, and by direction of the judgment creditors, levied the same upon eleven hundred and ten dollars coin, the money of the railroad company, and paid it over as money made upon the execution. On the preceding 4th day of

February, an execution in favor of the respondent and against the same defendants was delivered to Sydney Wright, a deputy of the appellant, which was returned unsatisfied for the reason that the officer could find no property upon which to levy. The respondent has brought this action to recover the amount of the execution delivered to Wright, insisting that because it was placed in the hands of the deputy before the junior execution was delivered to the sheriff, it should first be satisfied, and that the sheriff was guilty of misconduct in not thus applying the money that came to his hands, instead of paying it over to the bank. At the same time it is conceded that the sheriff acted in perfect good faith in the matter, *and that when he levied upon and paid over the money to the bank, he had no notice whatever that his deputy held any execution against the same debtor.* In view of these facts, upon what principle is it sought to charge the appellant in this action? It is **this**. A delivery of an execution [*207] to a deputy sheriff is said in legal effect to be a delivery to the sheriff himself, since, in contemplation of law, all the deputies of the sheriff are but one officer, being all servants of the same master, and that, therefore, the sheriff must be held chargeable with constructive notice of the prior execution in the hands of his deputy. And upon this fiction of the law the whole case hinges.

It is undoubtedly true that for many purposes a sheriff and his deputies are regarded as one officer, in the sense that an official act of the deputy is deemed the act of the sheriff, and the sheriff is held responsible for such act as his own, though he may have had no personal knowledge of the matter, and been individually guilty of no wrong. All processes are directed to the sheriff as such, who is required to do the thing therein commanded to be done; and the sheriff is responsible to the world for all breaches of duty or official misconduct on the part of any of his deputies. For this reason an action for a breach of duty of the office of sheriff must be brought against the high sheriff, though the breach was by the default of the under sheriff. *Cameron v. Reynolds*, 1 Cowper (Eng.) 403. In this sense the sheriff and his deputies may be said to constitute one officer. But still the deputies of a sheriff, in relation to each other, must often be considered as sev-

eral officers, with distinct rights, and acting with distinct liabilities. *Odiorne v. Colley*, 2 N. H. 66; *Vinton v. Bradford*, 13 Mass. 114; *Thompson v. Marsh*, 14 Id., 269; *Bagley v. White*, 21 Mass. (4 Pick.) 395. * * * [*208] * * * Take a case suggested on the argument, and which will occur to any one reflecting on the subject. An execution against A is put into the hands of a deputy, who knows of no property belonging to A to satisfy the same. Another deputy has information of property possessed by A sufficient to satisfy the execution, but has no knowledge that an execution is out against him. The sheriff has no knowledge of any execution against A, or of any property belonging to him. Under these circumstances, is the sheriff to be charged with constructive notice of the execution in the hands of one deputy, and of the information possessed by the other in respect to property belonging to the debtor, and thus held liable for a breach of duty in not making the money on an execution which he never saw? To contend for such a proposition would seem little else than the most glaring absurdity; and yet we see no escape from such a result, if the maxim that the sheriff and his deputies are to be regarded as one person, is to be accepted without limitation. * * * [*210]

It follows from these views, that the judgment of the circuit court must be reversed, and a new trial ordered.

Reversed.

Compare *Ferguson v. Williams*, 3 B. Mon. (Ky.) 302.

BOUCHER v. WISEMAN.

Croke Eliz. 440. (Michaelmas term, 37 & 38 Eliz.; A. D. 1596)

Decided in the Common Bench before Anderson, C.J., Beaumont, Walmsley, and Owen, JJ.

Action upon the case against the defendant, late sheriff of Essex. Whereas the plaintiff had recovered against Pynder 100*l.*, and had a *fieri facias*; that the defendant by virtue thereof levied 28*l.*, and had not returned the writ nor paid money to the plaintiff. Defendant pleaded not guilty. And now upon evidence to the jury it was proved that the writ was delivered to Cowell, the defendant's under-sheriff, 9 Nov., 34 Eliz., and the same day he made execution. And he proved, that the same day a writ of

discharge was delivered to him, dated 6 Nov., 34 Eliz. But because he did not prove that he had notice of this writ of discharge before the execution served, THE COURT held clearly that he was yet sheriff, and chargeable to the plaintiff's action.

The defendant also showed the indenture whereby he made Cowell his under-sheriff; wherein was an exception, that he should not meddle with the execution of any writ above 40*l.*; so as to that he was not his under-sheriff, but he did it *de son tort demesne*, and the defendant is not chargeable therewith. But all THE COURT held it to be a void exception: for when he made him his under-sheriff, therein was included that he should execute all writs; and therefore the exception is repugnant and void.

Thirdly, it was alleged, that this was not a due execution; for Pynder had made a sale of his goods before, &c., and shewed the deed dated the same day of the writ of execution. ET PER TOTAM CURIAM, although the gift were bona fide, yet the execution might be taken of those goods. For by the suing forth the execution, all the defendant's goods were liable; so as no gift of the said goods, the day of the date of the writ or afterwards, can stop the execution. Wherefore, they resolved the jury accordingly, without inquiring of the fraud, and they found for the plaintiff. Vide 4 Hen. 6, pl. 7; 17 Ass. pl. 2; Eliz. Dyer 219.

ALBRECHT v. LONG.

25 Minnesota 163. (1878)

**Same—Under Modern American Rule—First Levy under Last Writ—
Sale under All—Proceeds Applied on First—Liability of Officer—
Review of Statutes Fixing Time When Lien Attaches—Purpose
of Statutes—How Far Sheriff and Deputy are One Person
—When Sheriff Liable for Failure to Serve First.**

Action by Ernest Albrecht *et al.* against Seth W. Long *et al.* on official bond. From judgment for defendants plaintiffs appeal. Reversed.

Lewis Brownell, for plaintiffs.

B. S. Lewis, for defendants.

The Court by Gilfillan, C.J. The defendant Long was sheriff of the county of Waseca, and Stevenson was his deputy. Executions issued against the property of Sherwins were delivered as

follows: One in favor of Charles Shedd, to the sheriff himself, at 10:30 o'clock p. m. of March 19, 1877; one in favor of Chancy Hardin *et al.*, and another in favor of J. S. Ricker *et al.*, to the sheriff in person, at 2 o'clock a. m. of March 20; and one in favor of these plaintiffs, to the deputy, at 6 o'clock a. m. of the same day. The deputy levied this last execution at half-past 6 a. m. of the same day, and took possession of the property. About half an hour thereafter, the sheriff levied the three executions delivered to him in person, upon the same property, and, upon his request, the deputy delivered to him the plaintiffs' execution, and the possession of the property. The sheriff advertised the property for sale under several executions, not naming either of them, and sold the property, and applied the proceeds, after deducting his fees, to the payment in full of the Shedd execution, and the remainder upon the execution of Hardin *et al.*, and returned the plaintiffs' wholly unsatisfied, whereupon plaintiffs bring suit against the sheriff and the sureties in his official bond.

The question presented is, whether the levy of an execution gives the execution creditor a lien upon the property, which entitles him to priority over other executions in the hands of the same officer against the same debtor, delivered to the officer before, but not levied till after, his? For these executions are all to be taken as delivered to the sheriff. The deputy is not an officer having a separate official existence from that of the sheriff. He is an officer of the sheriff's, whose powers and duties, so far as they affect the public, it is true, are defined by law. But he holds the office at the pleasure of the sheriff, is appointed and removable by him, and civilly responsible to him, and not to the parties whose writs come into his hands. He must act in the name of the sheriff, and not in his own name. All his acts are, in law, the acts of the sheriff; and the responsibility, civilly, for such acts done [*171] within his authority, is that of the sheriff. Our statutes do not, as do the statutes of some of the states, alter in any way the *status* of the deputy.

It is the duty of the sheriff, upon a writ coming into his hands, to use due diligence in the execution of it. It attaches to the writs as they come into his hands, and it follows that it is his

duty to execute first those which are first delivered to him. Upon several executions in favor of different creditors against the same debtor, it is his duty to the creditor in the first delivered, to execute that first; and to the creditor in the second, to execute that second; and so through them all. This is the duty he owes to the several creditors. But the rights of the creditors, as against each other, are not necessarily controlled by it.

At the common law, an execution bound the goods of the debtor from the time of the *teste*, even though they were subsequently transferred to a *bona fide* purchaser. The statute 29 Charles II., c. 3, § 16, provided that execution "shall bind the property of the goods against which such writ of execution is sued out, but from the time that such writ shall be delivered to the sheriff, under-sheriff or coroner, to be executed." Under the common-law rule, the execution operated as a lien in favor of the creditor for the satisfaction of his debt, from the time of the *teste*, and, under the statute, it operated as such lien from the time of its delivery to be executed. And the latter would continue to be the rule, were it not for the provisions of the statute of this state. Gen. St. c. 66, § 269, enacts that "until a levy, property not subject to the lien of the judgment is not affected by the execution." So that the creditor acquires a lien on the property, by virtue of his execution, only from the levy. The property is not affected by the *teste*, nor the delivery to the sheriff. The levy fixes the rights of the creditor as to the specific property. It is argued that the statute 29 Charles II., and the General Statutes were passed only for the protection of *bona fide* purchasers, and therefore do not affect the rights of [*172] execution creditors as against each other. If this were so, their rights would be controlled by the common-law rule, that the execution binds the goods from its *teste*, and the execution last delivered and levied might take precedence of all the others, because of the priority in its *teste*. We do not think the statute was intended to operate only as between the execution creditor and a *bona fide* purchaser, as claimed, but it was intended to define absolutely, as its language indicates, the rights of the creditors as to the specific property, and as between him and all others.

The execution first levied, then, has the first lien on the property, though there may be others in the hands of the sheriff, which were delivered to him before the one levied. *Russell v. Lawton*, 14 Wis. 202; *Knox v. Webster*, 18 Wis. 406. The creditors in executions afterwards levied cannot claim to be paid out of the property, until the one first levied is satisfied.¹ This would be so in a contest between the creditors, and it must be so in a dispute between the creditor having the first lien by levy, and the sheriff. The remedy of the creditor in the execution first delivered is against the sheriff. If the latter, through negligence, omit to levy the first execution till a second has been levied, and loss thereby accrues to the first execution creditor, an action will undoubtedly lie.

It does not follow, however, from the rule of law that a sheriff and his deputies are regarded as one officer, that where several executions against the same debtor are placed, some in the hands of the sheriff in person, and others in the hands of his deputy, and in consequence thereof, and without actual negligence of the sheriff or deputy holding the execution first delivered, a subsequent execution is first levied, that the sheriff is liable to the creditor in the first execution. When it comes to a question of diligence, the law recognizes the fact that the sheriff and his deputy are different persons, though in theory one officer. And as it does not require impossibilities, it regards the question of diligence in view of [*173] that fact, and of what may naturally happen in consequence of it. *Russell v. Lawton*, 14 Wis. 202; *Whitney v. Butterfield*, 13 Cal. 335.

Order reversed, and new trial ordered.

Same case, 27 Minnesota 81, 6 N. W. 420. (1880)

Same—Agreements between Sheriff and Deputy—Who Bound—Breach by Deputy.

After the next trial defendants appealed from judgment for plaintiffs, appearing by same counsel as before. Affirmed.

The Court by Gilfillan, C.J. * * * There was evidence of a previous arrangement between the sheriff and deputy to the effect

¹*E. C. Meacham Arms Co. v. Strong*, 3 Wash. T. 61, 13 Pac. 245.

that the latter should not serve any process issuing from the district court; that all such process should be served by the sheriff in person. Defendants claim that, had this arrangement been acted on, plaintiffs' [*83] execution would have come into the hands of the sheriff, personally, before service, and that he would have served the executions in their proper order; that the deputy was induced, by the attorney's false representations, to disregard the arrangement, and to receive, and at once, without consulting the sheriff, to levy plaintiff's execution. Such an arrangement, even if it might bind the sheriff and deputy, could be of no effect as to third persons. A deputy sheriff, it is true, is an officer of the sheriff, appointed and removable by him, civilly responsible to him, and acting only in his name. But the deputy's powers and duties, so far as the public are concerned, are fixed by law, and cannot be varied by any agreement between him and the sheriff. Those powers and duties are vested in and imposed on him, not for the convenience of the sheriff, but of the public. Notwithstanding the arrangement, therefore, it was the duty of the deputy to receive the execution, and with all reasonable diligence to execute it. That the deputy was, by false statements, induced to do his duty in receiving the execution, and to perform his duty to levy it at once, without delay, is not in law a fraud. Deceit, not followed by what the law recognizes as a wrong, is not fraud. * * *

Judgment affirmed.

In *Whitney v. Butterfield*, above cited, a sheriff was sued for failure to levy before 1 a. m. Monday, a writ of attachment handed him between 9 and 10 p. m. Sunday, by reason of which delay a later attachment was first levied by one of his deputies in favor of another creditor. The delay of an hour at midnight, after he could legally execute the writ, was not sufficient ground for action, it appearing that the sheriff had no notice of the other writ or warning that great haste was necessary. The court discuss at length the degree of diligence required of such officers. Compare *Commonwealth v. Magee*, ante, p. 307, and *Russell v. Lawton*, ante, 300, 330.

An officer received an execution at 4 p. m. with request to execute it at once by taking a designated stock of goods in a store in a town five miles distant, accessible by street car, through railway, or horse and carriage, and at the same time was warned that the judgment debtor would soon assign and was believed to be at that time making out the papers. The sheriff promised to attend to it that night if he had to go himself. He missed the train that night by reason of a

recent change in time of departure and decided to wait till the next day. He went on the train at 10 a. m. the next day, and found the store locked, an assignment having been made and filed between 11 and 12 a. m. that day. Afterward he returned the writ unsatisfied for want of goods and was held liable in an action by the creditor for a breach of 'official duty. *Guiterman Brothers v. Sharvey*, 46 Minn. 183, 24 Am. St. 218, 48 N. W. 780.

PAYNE v. DREWE.

4 East 523. (44 Geo. III. A.D. 1804)

This decision was rendered by the English court of king's bench; Ellenborough, C.J., Grose, Lawrence and LeBlanc, JJ.

Under 29 Car. II.—Rule of Priority—Duty of Officer—Liability to the Creditor Whose Writ He Holds—Liability to the Other Creditor—Liability for Contempt of Court—Distinguishing Cases in Which One Officer Holds All the Writs —Importance of Actual Levy.

Action by Payne against Drewe as sheriff of Dorset, for a false return *nulla bona* to a *fi. fa.* on a judgment against C. Sturt. Judgment for plaintiff. The sheriff first took and inventoried sufficient goods of the execution defendant to satisfy the *fi. fa.*, but afterward quitted possession of them and returned his writ *nulla bona*, because before his writ was issued the court of chancery had ordered a commission of sequestration on the complaint of H. W. Portman *et al.* against said C. Sturt to compel payment of 2000*l.*

Gaselee, for plaintiff.

Dampier, for defendant.

The Court by Lord Ellenborough, C.J. * * * We shall, for the purpose of the present question, assume that the award of the sequestration had the same obligatory effect as the award of a writ of execution against the goods would now have at the common law, and shall even further assume, * * * that a sequestration binds from the very time of awarding the commission, * * * in which respect it is put upon the footing of an execution at the common law, * * * before the statute of frauds, and which execution at common law then related to the *teste* or award of the execution; I say, thus considering the effect of a sequestration for the purpose of this question (and in so considering it we allow it the most extensive effect which can possibly be claimed on its behalf), it still does not appear to us that the sequestration in question did,

under the circumstances, afford a sufficient excuse to the sheriff for not executing the writ of *fiery facias* at the suit of the plaintiff. The sheriff is not excused, if the sale he was required to make under the *fiery facias* would, if made, have been a valid and effectual one in favor of his vendee: and, if he would not, by making such sale thereunder, [*538] have subjected himself either to the action of the party interested in the sequestration, or to the punishment of the court of chancery as for a contempt of its process. Whether the sale he would have made, supposing he had sold under the *fiery facias*, would have been a valid and effectual one, depends upon the sense in which, and the extent to which, goods shall be considered as *bound* by the award of an execution before the statute of frauds, and by the delivery of the writ of execution since that statute. The sense in which, and extent to which, goods are in either case said to be *bound* is, that it binds the property as against the party himself and all claiming by assignment from, or representation through or under him: but it does not so vest the property in the goods absolutely as to defeat the effect of a sale thereof made by the sheriff under an execution. This was settled in the case of *Smallcomb v. Cross* [reported, post, 445]. * * *

Assuming, therefore, upon these authorities of Lord *Holt* and Lord *Hardwicke*, and particularly on the authority of the case of *Smallcomb v. Cross, &c.* as decided by Lord *Holt*, and which has been generally received and referred to as the established law on the subject, that the sheriff could have made a valid and effectual sale in this case; the next questions are, Would he, by executing the writ of *fiery facias*, have subjected [*542] himself to the action of the party to the sequestration, or to punishment by the court out of which it issued? As to the first of these questions, it is certainly to be answered in the negative. What pretence of complaint can he have against the sheriff who gave no notice of that process in deference to which the sheriff was to forbear to levy, which he might easily have made available by ordinary diligence, and who took no steps for 18 months to make it so? *Vigilantibus non dormientibus leges subveniunt*. If he did not enforce it during that period, at what period was it to be expected that he would do so? The commission extends to Mr. *Charles Sturt's* goods

not in the bailiwick of one sheriff only, but throughout the whole realm. Were all his majesty's subjects to hold their means of remedy against the personal estate of Mr. C. *Sturt*, in whatever county they might be found, in suspense and abeyance till the parties to the sequestration should think fit to avail themselves of theirs? * * *

As to the light in which the court of chancery would view an execution at common law, executed [*544] under these circumstances; the contempt, if any, which that court would probably animadvert upon would be a contempt of its own process by those who had procured it to be awarded, and the commissioners who were empowered, and who instead of putting it in force, suffered it to become the means of protection to him against whom it was granted and required to act under it. As against these parties, and also against Mr. C. *Sturt*, the defendant in the execution, the sheriff may, if he can make out a case of collusion between them, yet perhaps be able to obtain some relief by the intervention of that court in his favor. That protection and a full indemnity he might have had for asking for in the first instance from that court; or this court would, upon his application, have enlarged the rule upon him to return the writ of *feri facias*, unless the plaintiff would have indemnified him against the sequestration; so that if he now stand unprotected against the action of the plaintiff, it is by his own neglect that he does so. * * *

The case of *Hutchinson v. Johnston*, 1 Term Rep. 729, in which it was holden, that where two writs of *feri facias* against the same defendant are delivered to a sheriff on different days, and no actual sale of the defendant's goods is made, the first execution must have the priority, may be supposed, on the first view of it, to lay down a doctrine somewhat contrary to what has been already stated; but that case appears to me to decide only that where two writs of *feri facias* are delivered to the same sheriff, he must, as between himself and the several plaintiffs in those executions, sell under that writ which is first delivered, although he may have first seized under the last delivered writ. But in the present case there are two different writs or authorities, each so far binding the goods as to warrant

a sale under them, one delivered to the sheriff, and another previously delivered to other persons, equally competent with the sheriff to have seized under them. And the question is not which of two writs, equally *mandatory* to *the same* person, shall have a priority in point of execution by him, but whether one writ mandatory to the sheriff for one purpose shall remain in his hands wholly suspended in point of execution, merely because other persons having a similar competent authority under other process of another court to them directed have chosen [*545] to neglect the execution of such last-mentioned process; which brings the question nearly to this, namely, Whether a writ which is from the delivery immediately binding as against the defendant, so as to tie up his hands from alienating the goods which might be seized under it, is to be regarded as in effect self-executed by its own proper legal effect and force for all purposes? That it is not, the case of *Smallcomb v. Buckingham* decides; for if it were so, then any sale made by the sheriff under a second execution, when he had a former one in his hands, would be a nullity in respect even to the sheriff's vendee thereof, which would directly contradict what was established in that case. It appears to me, therefore, not to be contradictory to any cases, nor any principles of law, and to be mainly conducive to public convenience, and to the prevention of fraud and vexatious delay in these matters, to hold *that where there are several authorities equally competent to bind the goods of a party when executed by the proper officer, that they shall be considered as effectually, and for all purposes, bound by the authority which first actually attaches upon them in point of execution, and under which an execution shall have been first executed.* In this case, being of opinion that the sheriff would not, by executing the writ of execution to him directed, have subjected himself either civilly or criminally to any inconveniences, we think that he ought to have done so; and not having done so, he has made himself liable to this action, in which we are of opinion that the plaintiff is entitled to recover.

Postea to the Plaintiff.

M'GREGOR v. BROWN.

22 Massachusetts (5 Pick.) 170. (1827)

Knowledge by Other Creditors—Statutory Notice—Whose Duty to Record Levy—Failure to Return Writ, Effect—Parol Evidence to Identify Property.

Action on the case by John McGregor against Henry C. Brown as sheriff, for an alleged default of his deputy, R. Deming, in not recording an execution and levy thereon or returning according to the precept, by reason of which a subsequent attachment obtained priority. Plaintiff's execution was levied on the "carding machine building," the attachment on the "clothier's works." By parol it was shown that both were the same. Judgment for plaintiff. Case submitted by agreement to this court, consisting of *Parker, C.J., Putnam, Wilde and Morton, JJ.*

Jones & Byington, for plaintiff.

Gold, contra.

Per Curiam. It is clear from the case of *Waterhouse v. Waite*, 11 Mass. 207, that it is not incumbent on the officer to cause an execution levied on land to be recorded. But it is his duty to enable the creditor to have it put on record. Merely not returning the execution to the clerk's office within three months after the levy, will not in all cases subject him to damages, as appears by the case of *Tobey v. Leonard*, 15 Mass. 200. But there the execution was returned at the return day; here it was not; and the court are of opinion, that it not being duly returned so that the plaintiffs might obtain it of the clerk, the sheriff became liable, unless he should prove that it was delivered to the plaintiffs in time to have it recorded. No evidence of that sort has been offered.

We see no valid objection to the admission of the parol evidence. It did not add to, nor contradict the return, but was introduced to show that the land levied on under one description was the same as that which had been attached under a different description. As to the right of property, it is said that the subsequently attaching creditors cannot hold the land, for that they had notice of the plaintiffs' attachment; and the case has been likened to one in which a party has notice of a prior unrecorded deed. But the same principle does not apply in the case of a prior attach-

ment. It does not appear that the intervening creditors knew that the plaintiffs would recover a [*175] judgment and would levy on the land; and besides, all creditors who are in pursuit of satisfaction of their debts by means of attachment, are considered as running a race on equal ground, and each is entitled to take advantage of defects in the proceedings of the others. See *Cushing v. Hurd*, 4 Pick. 253.

Many statutes make the recording of the levy part of the officer's duty. This is now the case in Mass. To the point that actual notice does not cure failure to record, compare *Doe v. Flake*, 17 Me. 249. In that case it was held that the second attaching creditor was entitled to priority though he acted as appraiser when the unrecorded first levy was made. The court said he might nevertheless not know that the first levy had not been abandoned.

BURK v. CAMPBELL.

15 Johnson (New York) 456. (1818)

Liability of Officer for Failure to Return Writ by Return Day—Necessity of Special Order to Return—Creditor's Election of Remedies.

Case by Burk against Campbell, sheriff of Franklin county, for not executing or returning a *fi. fa.* From judgment for defendant plaintiff brings error. Reversed.

The Court by Thompson, Ch. J. * * * The only plea interposed by the defendant was, that he had not been required, by any rule of court, to return the said writ, according to the course and practice of the court. To this plea there was a general demurrer, upon which the court gave judgment for the defendant.

The judgment was erroneous. There can be no doubt that an action will lie against a sheriff, for neglect of duty, in not returning an execution delivered to him. The declaration in the court below set forth, with all necessary certainty, the judgment and execution; the delivery of the same to the sheriff, before the return day; and that the defendant in the execution had sufficient goods and chattels, lands and tenements, within the county, whereof the money, required by the execution to be raised, might have been levied and collected, but which the defendant neglected and refused to do. It is no answer for the sheriff to allege that he had not been ruled to return the execution. This he was bound to do, without being ruled. The plaintiff had his election to proceed either way; and

the sheriff cannot avail himself of his own neglect of duty to defeat the plaintiff's action. This is a principle fully recognized by this court in *Hinman v. Brees*, 13 Johns. 529. Our statute concerning sheriffs recognizes such an action against the officer. It declares that if any sheriff, or other officer, shall not make due return to any writ delivered to him to be executed, he shall not only be [*458] liable to attachment, or amercement, but, also, to an action on the case for damages, at the suit of the party aggrieved. 1 N. R. L. 423. The judgment of the court below must be reversed.

Judgment reversed.

LEDYARD v. JONES.

7 New York (3 Selden) 550. (1852)

Liability of Officer for Failure to Make Amount of Execution Given Him for Service—Measure of Damages—Defenses.

Action by Ledyard against Jones as sheriff for failure to return an execution. From judgment for plaintiff defendant brings error. Affirmed.

N. B. Blunt, for appellant.

G. R. J. Bowdoin, for appellee.

Watson, J. There is but a single point in this case which the court is called upon to decide, and that is, as to the amount of damages the respondent is entitled to recover in this action. The verdict finds that the appellant did not levy the execution placed in his hands: that he made a false return upon it: that he did not return it at the expiration of sixty days: and it was admitted on the trial that the defendant in the execution had both real and personal property out of which the execution might have been satisfied. The amount of the execution was \$500.49, and the jury found a verdict of \$200. This question has been repeatedly passed upon in the supreme court, and I regret that the decisions are conflicting. In *Patterson v. Westervelt*, 17 Wend. 543, where it was shown that the judgment debtor had abundant means to satisfy the execution, the court held, that the plaintiff sustained damages to the whole amount of the judgment; and that having been kept out of his money by the wrongful act of the officer in not executing and returning the process according to its commands, the debt as proved by the judgment constituted [*552] the true

measure of damages. In the case of *The Bank of Rome v. Curtis*, 1 Hill, 275, the court held that the sheriff was *prima facie* liable for the whole amount due, and that it was no answer to say that the defendants in *fi. fa.* were still able to pay. This doctrine was again laid down by the court in the case of *Pardee v. Robertson*, 6 Hill, 550, together with another upon which the appellant has made a point, and that is, that the respondent might recover the full amount of the judgment without averring special damages in his declaration. All of these cases, as well as *Weld v. Bartlet*, 10 Mass. 470, 474, lay it down with this qualification, that the debt is *prima facie* the true measure of damages, the sheriff being at liberty to mitigate the amount by showing affirmatively that the whole sum could not have been collected if due diligence had been exercised in executing the process. In the case of *Stevens v. Rowe*, 3 Denio, 327, the court held an entirely different doctrine. They held that the plaintiff could not show that the judgment debtor had real estate out of which the *fi. fa.* might have been satisfied unless expressly averred in the declaration, and also that the sheriff might mitigate the amount, not simply by showing his inability to collect the money, but by proof that the debt was still safe and collectible. I confess I am unable to see the justice of the rule laid down in the case of *Stevens v. Rowe*, and if it is good law, the statute which gives the plaintiff a right to recover damages against a sheriff who neglects to execute process delivered to him, is a mere nullity. It in truth affords him no remedy whatever, and allows an unfaithful and defaulting officer to take advantage of his own wrong, a privilege that the law accords to no other person. According to this construction, if the officer is sued for a neglect of duty, he can say the defendant in the execution had no property out of which he could collect the money, and that it is conceded is a good defense, or he can say he has property out of which you can still collect it, and therefore nothing but nominal damages can be recovered against me, which can only be the damages the plaintiff has sustained by the delay in collecting the money, simply the [*553] interest upon the interest of the money due when it ought to have been collected. To such a doctrine I can never yield my assent, for a plaintiff, if this is tol-

erated, might never be able to collect his debt. The second execution issued upon the same judgment would admit of the same defense, and so on, as often as they might be issued, provided the judgment debtor did not in the meantime get rid of his property. The rule laid down by the court in the cases first cited, is by far the most salutary, and to my mind a just and fair exposition of the statute giving a remedy against defaulting officers. * * * [*554] * * * The judgment of the supreme court should be affirmed.

Ruggles, Ch. J. and Jewett, Johnson and Welles, JJ., concurred in the opinion of Judge Watson.

Gardiner and Morse, JJ., dissented, but wrote no opinion.

Judgment affirmed.

See also *Chaffin v. Crutcher*, 2 Sneed (Tenn.) 360; *Taylor v. Hancock*, 19 La. An. 466. This is the better view. In the cases to the contrary, like *Colyer v. Higgins*, post, and *Commonwealth v. Magee*, ante, the question seems to be disposed of without much consideration and without being argued by counsel. In a later Pennsylvania case a constable was sued for releasing property levied on and judgment rendered against him for the amount of the execution, which the supreme court affirmed, saying: "The measure of damages is not always the amount of the execution but the value of the property levied on when it does not equal the amount claimed in the execution. This furnishes the true rule. But the presumption here is that the value of the goods was at least equal to the amount claimed." *Corson v. Hunt*, 14 Pa. St. 510, 53 Am. Dec. 568. "What the sheriff could have made for the plaintiff, by a proper discharge of his duty, is the just and reasonable, as well as the legal, standard of his liability." *Commonwealth v. Contner*, 18 Pa. St. 439.

COLYER v. HIGGINS.

62 Kentucky (1 Duvall) 6, 85 Am. Dec. 601. (1863)

Powers and Duties of Officer After His Term of Office Expires—Liability of Sureties to Old and New Officer—Character of Venditioni Exponas.

A. J. James, for appellant.

C. Bacheller, for appellees.

The Court by Bullett, J. This is an action against Colyer, the sheriff of Rockcastle county, and his sureties, upon an official bond executed on the 3d of January, 1853, to recover the amount of an execution placed in his hands, and thirty per cent damages for his failure to return the same for thirty days after the return day

thereof. A judgment was rendered accordingly against the defendants, from which they appeal.

In our opinion, the plaintiffs have not shown a right to maintain an action upon said bond.

The petition states, that in the year 1852, an execution in favor of the plaintiffs, against one Kietley, was placed in the hands of said Colyer, sheriff of said county, and was levied by him on some property; that afterward, on the 24th of November, 1852, a writ of *venditioni exponas* was issued thereon, returnable the fourth Monday of January, 1853, and "was also in its lifetime [*7] placed in the hands of said Colyer while sheriff as aforesaid;" and that he failed to return the same until the 25th of April, 1853.

Under the constitution of the state, the office of each sheriff expired on the first Monday in January, 1853, or as soon thereafter as his successor qualified. Art. 6, § 4. The facts before mentioned authorize the assumption that Colyer was elected and qualified for two terms, the first of which expired in January, 1853.

It does not distinctly appear, nor does it seem to be material, whether the writ of *venditioni exponas* was delivered to Colyer before or after the expiration of his first term. That writ gives no new authority to the sheriff. It merely commands him to perform his duty under the original writ. According to the settled principles of the common law, he who begins the execution of a writ of *feri facias* must end it. A sheriff who levies upon property may sell it after the return day and after returning the execution, without a writ of *venditioni exponas*, and after he has gone out of office; and it is his duty to do so. *Cox v. Joiner*, 4 Bibb (Ky.) 94; *Wolford v. Phelps*, 2 J. J. Marsh. (Ky.) 31; *Rogers v. Darnaby*, 4 B. Mon. (Ky.) 238, 241; *Irwin v. Pickett*, 3 Bibb (Ky.) 343; *Lofland v. Ewing*, 5 Litt. 42; *Neilson v. Churchill*, 5 Dana (Ky.) 333; *Spang v. Commonwealth*, 12 Pa. St. 358, and cases cited. And if he sells property he must convey it, though he may have gone out of office. *Allen v. Trimble*, 4 Bibb, 21; *Trimble v. Breckenridge*, *Ib.*, 479. These principles, so far as they apply to the question under consideration, do not appear to have been changed by statute.

It is clear, therefore, that if Colyer had gone out of office on the first Monday in January, 1853, it would have been his duty to execute the writ of *venditioni exponas*, whether it came to his hands before or after the expiration of his term; and that his sureties (for his first term) would have been liable for his failure to do so. It is equally clear, that if he had gone into office, for the first time, in January, 1853, it would have been the duty of his predecessor, and not his duty, to execute the writ; and that his sureties in the bond sued upon would not have been liable for his failure to do so. It is evident, therefore, [*8] that the duty of executing said writ was devolved upon him by his first, and not by his second term of office; and that the bond sued upon, which relates only to his second term, did not bind either him or his sureties for the performance of that duty, which appertained to his first term.

But the appellees have a right, independently of the bond, to recover nominal damages from Colyer for failing to return the writ as required by law; and this is the only relief to which their petition shows they are entitled.

Upon other points argued by counsel we need not express an opinion. The judgment is reversed, and the cause remanded, with directions to dismiss the petition against the sureties, and for further proceedings against Colyer not inconsistent with this opinion.

Reversed.

HARTLEIB v. McLANE.

44 Pennsylvania St. 510, 84 Am. Dec. 464. (1863)

**Sheriffs—Degree of Care Required of Them in Keeping Property—Liability for Property Stolen from Them—Distinction
Between Mesne and Final Process.**

Case by Mathias Hartleib against John W. McLane as sheriff of Erie county for value of goods levied on under plaintiff's *fi. fa.* and stolen between the day of levy and the day of sale out of a store in which the goods were seized, and of which the sheriff had kept possession. From judgment for defendant plaintiff brings error. Reversed.

J. C. & F. F. Marshall, for plaintiff.

Benjamin Grant & William L. Galbraith, for defendant.

The Court by Thompson, J. There is but a single point of inquiry in this case; that involves the question how far a sheriff is

liable for the safe custody of goods taken in execution by him, and the degree of care to be observed, whether of an ordinary bailee for hire, or a common carrier or innkeeper, so as to raise a responsibility for loss by theft. * * * [*512] In *Wheeler v. Hambright*, 9 S. & R. (Pa.) 390, although the action was for an escape, yet the reason for liability was rested upon general principles of public policy. There the sheriff had made a return of *non est inventus* to a *ca. sa.*, but before the return his deputy had arrested the defendant on another writ. Under these circumstances the sheriff was holden as for an escape on the first writ. * * *

Why should a sheriff, having in custody the person of a defendant as a satisfaction of the judgment on which his writ is founded, on principle, stand on different footing from that on which he would if he had the custody of the defendant's property for the same purpose? It is not easy to see the distinction, and a more difficult task would be to point out where the argument, good in the one case, is defective in the other. The proposition is, that authority settles, that ordinary care is not sufficient in the one case; but inasmuch as direct authority does not exist either way, ordinary care is sufficient in the other. This is not a *non sequitur*. It seems to me to be more reasonable to apply the strict rule to the custody of goods than to the person; for if they be stolen the creditor cannot levy again, and he must bear the loss without the slightest default of his own; whereas, for an escape, if it is the defendant's own act, he may be again arrested. In the one case the debt is absolutely satisfied by the levy, in the other it is only contingently so. * * * [*513] * * *

The sheriff, when he levies, is armed with authority to become the exclusive custodian of the property seized, and it is his duty to become so in fact, if he would not risk its abstraction. This care is his personal interest, if the law requires him to account for the property, unless he is divested of it by the act of God, the public enemies, the law, or by some irresistible accident, such as sudden fires, or the like. Nothing but such a rule we think adequate for such a trust, and we believe the stringency of the law in Pennsylvania in regard to sheriffs, has so much increased the care of incumbents of the office in the discharge of their duties, that it ac-

counts for the fact that we have but few cases, comparatively speaking, against sheriffs for deficiency in the discharge of their official functions. The opinion of jurors of what is due care and diligence, although in many cases it is necessarily a standard of liability, is at best a loose one, especially in regard to officers of influence, such as sheriffs. It would be found to be too flexible for exact justice. Through sympathy for the officer the debtor and creditor would be liable to be forgotten. One rule would govern one case, and a different one another. It is infinitely better, therefore, to contract the necessity for a resort to vague standards than to enlarge it. We shall doubtless find no lack of good and efficient men ready and willing at all times to risk the responsibility of the rule for the sake of the office.

An objection is sometimes urged that the officer is allowed no fees for watchmen, or for the removal of goods. This is doubtless because the law-making power has supposed that the taxable costs for executing process, and in making sales, are sufficient for this purpose. If they are not, the law should be altered; for it would be a bad system that would take away the control of the debtor over his property, which may not, before sale, go into the hands of the creditor for preservation, and yet leave it liable to be stolen or embezzled while in the custody of the sheriff. [*514]

In *Watson on Sheriffs*, 188, the rule of the English authorities in regard to the liability of sheriffs in executing mesne process, is thus stated: "After the sheriff has seized goods, it is his duty to remove them to a place of safe custody until they can be sold, for if they be rescued, the sheriff is liable to the plaintiff for their value; *Sly v. Finch*, Cro. Jac. 514, Godbolt 276; *Mildmay v. Smith*, 3 Saunders (Eng.) 343; and it is said that if the sheriff take cattle, and afterwards the cattle die for want of meat, the sheriff is answerable for the value returned." *Clerk v. Withers*, 2 Lord Raym. 1075. The rule of the common law undoubtedly was, and is, that the sheriff is liable for goods seized on final process, unless prevented by inevitable accident or public enemies. The authorities above cited prove this beyond doubt. See also as to this the opinion of Mr. Justice Redfield, *Bridges v. Perry*, 14 Vt., 262.

The rule of the common law is maintained by this learned judge in the case cited, and the learned counsel for the defendant

in error were led into error in citing it as sustaining their theory of the case, in not adverting to the distinction drawn between an *attachment*, the object of which is to compel appearance, and an *execution*. In the former, the sheriff is held to occupy only the position of an ordinary bailee. The reason for the distinction seems to be not only in the effect between debtor and creditor as to satisfaction, but the delay before final process to dispose of the property, sometimes extending to several years, and usually continuing for at least a year, until the case is finally tried. To hold the sheriff to the strictness of the common law rule on the subject of final process to cases of attachment, would, in the opinion of this able judge, be unreasonable; but he adds, "where property is taken on final process, it is to be kept but a short time at longest, so that it may be closely watched and kept with this severe diligence for a few days without materially interfering with the duties of the sheriff." Where attachment process is used for different purposes, sometimes as final, and at others as mesne process, as it is in several of the New England states, errors on this point may easily be made as to what is the judgment of their courts, without carefully noticing the exact nature of the process adverted to. There is a distinction, well defined, I think, between the two kinds of process. It was drawn directly from the common law distinction between custody on a *capias ad respondendum* and a *capias ad satisfaciendum*. In the former it is said that the sheriff may return a rescue; *Mildmay v. Smith*, 3 Saunders (Eng.) 343, and note; *Clerk v. Withers*, 2 Lord Raym. 1075; *O'Neil v. Marson*, 5 Burr. 2813; which he may not do in the latter. See authorities for it above cited; see, also, as to the rule of liability: *Sanford v. Borning*, 12 Cal. 539; *Collins v. Terrell*, 2 S. & M. (Miss.) 383; *Abercrombie v. Marshall*, 2 Bay (S. C.) 90. [*515]

A case much relied on by the counsel on both sides, is *Browning v. Hanford*, first reported in 5 Hill (N. Y.) 588, afterwards in 7 Id. 120, and finally in 5 Denio 586. The point of that case was, whether a sheriff's return of a loss of goods by fire was evidence in his own favor. It seems to have been held that it was not. Various judges and senators expressed their views, in that case, on the extent of a sheriff's liability; all agreeing that for an unavoidable accident, such as a sudden fire, he was not liable, and a major-

ity seeming to hold that he was only answerable for the absence of ordinary care and diligence in regard to property taken on final process. A distinction is made between the bailee or receptor of the sheriff, as he is called, and the sheriff when he retains the custody of goods. In the former, that nothing short of the act of God, public enemies, or inevitable accident, will excuse the non-delivery of the property, while in the latter case, a loss, after ordinary care and diligence bestowed, is not to be visited with liability. The distinction seems hardly reasonable, and not quite logical. It was said, by some of the judges in that case, that the distinction grew out of the form of the receipt, which is an agreement without exception to deliver, while others say it is a general principle of law. If the liability grows out of the contract, resulting from its terms, then it does not affect any question or principle of law on the subject. But if it result from legal principles, I cannot comprehend why there should be any difference between the sheriff when he is bailee, and when his receptor is bailee; why utmost care will not excuse in the one case, and less than that will in the other. We feel no disposition to adopt the uncertain theories of this case, and abandon the salutary rule of the common law, which, although there has been but little reported judicial discussion of the question, has, I think, always among the profession been supposed to be the law of the state. I have no doubt, as was said in the case just referred to, that casualties such as sudden fires would and ought to be classed with inevitable accidents, and excuse the sheriff. * * *

Judgment reversed, and venire de novo awarded.

To the same effect see *Gilmore v. Moore*, 30 Ga. 628; *Collins v. Terrall*, 2 S. & M. (Miss.) 383. In *Runlett v. Bell*, 5 N. H. 433, a sheriff was held not liable to the attaching creditor for property deposited with persons at the time solvent, who afterward converted the property claiming to own it and then became insolvent, but stress was laid on the fact that the creditor had sued them in the name of the officer for the conversion, which was said to be adopting the officer's act. But see *Garrett v. Hamblin*, 11 S. & M. (Miss.) 219, and *Phillips v. Lamar*, 27 Ga. 228, in which last case the bank where the sheriff deposited the money failed and he was held liable.

Only ordinary care is ever required of officers holding property under attachments, and in the following cases this was made the measure of liability under executions: *Cresswell v. Burt*, 61 Iowa 590; 16 N. W. 730; *State v. Nelson*, 1 Ind. 522; *Moore v. Westervelt*, 27 N. Y. 234; *Lambreth v. Joffrion*, 41 La. An. 749, 6 South. 558.

4. WHERE THE WRITS MAY RUN AND BE EXECUTED.

Under this head prepare again on: *Pennoyer v. Neff*, ante, 48; *Lindley v. O'Reilly*, ante, 65; *Chicago, R. I. & P. Ry. Co. v. Sturm*, ante, 71; and, *Gowan v. Fountain*, ante, 145.

KENTZLER v. CHICAGO, MILWAUKEE & ST. PAUL RY. CO.

47 Wisconsin 641, 3 N. W. 369. (1879)

**Garnishment on Execution—Territorial Jurisdiction, at Common Law—
Constitutional and Statutory Provisions Construed—Effect
of Failure to Comply With Statute—Objection,
How Made—Proper Form of Execution,
Presumptions—Power to
Amend.**

Garnishment against Chicago, M. & St. P. Ry Co. (in form as if on an execution from the circuit court of Milwaukee county, but in fact) on an execution issued by the circuit court of Dane county to the sheriff of Milwaukee county, on a judgment in favor of Andrew Kentzler against C. S. Hardy, rendered in the municipal court of the city of Madison and recorded in the office of the clerk of the circuit court for Dane county. From an order of the circuit court of Milwaukee county quashing the garnishment for defects in the garnishment affidavit and summons, plaintiff appeals. Affirmed. Whether a transcript of the judgment was ever filed in the circuit court of Milwaukee county does not appear, and the only statement concerning it in the execution is that the judgment was rendered as appears by the transcript of it filed and docketed in the office of the clerk of the circuit court of Dane county, and commanding the sheriff to satisfy the execution out of any property "belonging to such judgment debtor on the day when such transcript was so filed and docketed in your county, or at any time thereafter."

The Court by Ryan, C. J. The execution on which the proceeding of garnishment was taken, is returned among the motion papers, and must be held to have been before the court below on the motion.

It is the foundation of the proceeding. The jurisdiction, so to speak, of the proceeding of garnishment rests on the execution; and a defect in the execution fatal to its own validity, is equally so to the proceeding taken upon it. *Executio est finis et fructus legis*. And, by the law governing courts generally, every court has inherent power to issue writs of execution on [*643] its own judgments, but not beyond its territorial jurisdiction. At the common law all process of all courts is limited to the territory over which their jurisdiction extends, and the power of any court to issue extra-territorial process is not inherent in it, but comes only by express statutory grant. *Sir Will Harbert's Case*, 3 Reports, (Coke) 111a; Jacob's L. Dict., "Jurisdiction."

Section 8, Art. VII of the constitution, declares that the jurisdiction of the circuit courts shall extend to all matters, civil and criminal, within the state, not excepted in that instrument and not prohibited by law. This is broad language, but should be construed in the light of other provisions of that instrument establishing the judicial system. * * * [*644] * * * And all the clauses of the constitution, taken together, clearly limit the territorial jurisdiction of the circuit court, directly conferred by that instrument, to the county in which it is held—clearly design the circuit court in each county to be a county court, with jurisdiction, civil and criminal, limited to the county, subject to a general, perhaps unlimited, power of the legislature to extend its civil jurisdiction throughout the state.

The legislative and judicial history of the state shows that this has been, practically, from the beginning, the construction put upon the constitution by the profession and by the people. The statute of June 29, 1848, providing for the first election of judges, limits the civil jurisdiction of a circuit court to its own county, as the jurisdiction of the territorial courts had been limited; and limits its *mesne* process in civil actions to its proper county, permitting such process to go to other counties only after service of some of the defendants in its own county. Various provisions followed from time to time, enlarging the power in civil proceedings, until now *mesne* process in transitory actions may generally issue throughout the state. * * * [*645] * * *

So it is seen that the authority of the circuit court of Dane county to issue the execution in this case to Milwaukee county must come by statute. Without statutory authority, such an execution would be mere waste paper.

The only authority of law for issuing execution from a circuit court to another county is found in § 5, ch. 134, R. S. 1858, now § 2971, R. S. 1878. This provides that executions against property may be issued to the sheriff of any county where the judgment is docketed; and it cannot issue to another county where the judgment is not docketed. *Smith v. Buck*, 22 Wis., 577. It is true that the language of the opinion in this case is confined in terms to such executions as affecting realty, because the question there was the validity of a sale of realty. But the judgment of the court extends to all executions, because the statute makes no distinction between executions against realty and personalty, and gives one and the same authority to issue any execution, upon one and the same condition.

The docketing of a judgment in the county to which the execution may go is therefore a condition precedent of the authority to issue it; and it is hardly necessary to say that a statutory power upon condition precedent cannot be executed without compliance with the condition. The docketing of a judgment in another county is, so to say, jurisdictional to an execution upon it to that county: as much so as a judgment to an execution to any county. And an execution issued to one county upon a judgment docketed in another, but not in it, is very much like an execution issued without any judgment, anywhere, to support it.

An execution, to be valid, must disclose on its face the [*646] authority to issue it. *Herman's Exec.*, § 55. An execution not stating a judgment to support it is void. Equally so is an execution issued to another jurisdiction, not stating the condition on which it may so issue. On this point *Smith v. Buck*, *supra*, properly understood, is conclusive. The case is not very well reported, and the opinion, perhaps, not quite accurate in terms. It did not appear in that case, as might be inferred from the report, that a transcript of the judgment had not been docketed in the county to which the execution issued. It only appeared that the execution

did not so state, and on that ground the execution was excluded by the court below; and the precise point of the judgment is that the execution was void for not reciting the docketing of the judgment in the county to which it was issued. The fact that it was not so docketed did not otherwise appear; but, because the fact was not recited in the execution, the negative was probably assumed, on the ground that *quod non apparet non est*.

The question in this case is clearly distinguishable, on substantial grounds, from *Sabin v. Austin*, 19 Wis., 421. There the execution was issued to the county in which the judgment was rendered. It recited the judgment, but not the time of docketing it, in compliance with § 8, ch. 134, R. S. 1858, now § 2969, R. S. 1878. This was held to be a defect only, amendable, and rendering the execution voidable, not void. A sale under the execution was therefore upheld. But the issuing of the execution within the territorial jurisdiction of the court was within the general power of all courts, independently of statutory authority; and § 8 went only to the form of the execution, not to the authority to issue it. Matter of form, in an act done under authority, is generally amendable; not matter on which the authority rests to confer jurisdiction of the act. And a circuit court issuing an execution defective in this particular to its own county, has before it the actual docket of the judgment by which to amend the [*647] execution; but, issuing an execution to another county, has not the docket of the judgment in that county before it—has nothing before it by which to amend the execution.

Nothing held or said in *Jones v. Davis*, 22 Wis., 422; *Swift v. Agnes*, 33 Wis., 228, or *Allen v. Clark*, 36 Wis., 101, appears to be in conflict with the views taken in this case.

This is not the ground on which the summons to the garnishee was quashed in the court below, or on which the order was supported by counsel in this court. But, because it is a defect jurisdictional to the whole proceeding of garnishment, it has been thought most fitting to rest the judgment of this court upon it. The execution was void upon its face, would have been no protection to the sheriff, and could support no proceeding to collect it.

The order of the court below is affirmed.

Later in a suit against the sheriff by one claiming by assignment from the judgment debtor after the levy, to recover the value of the goods, it was held that the irregularity in issuing the execution to and levying it in another county before the transcript was filed there was cured by subsequently filing it, the execution being fair on its face. *Rogers v. Cherrier*, 75 Wis. 54, 43 N. W. 828. This decision was followed in giving judgment in favor of the purchaser at execution sale in an execution brought to try the title, though the facts appeared on the face of the execution. *Hoerr v. Mehofer*, 77 Minn. 228, 79 N. W. 964, 77 Am. St. Rep. 674. The ruling in *Kentzler v. Chicago, M. & St. P. Ry. Co.* is criticized in this regard in *Gowan v. Fountain*, ante, 145, and this criticism is approved in *McDonald v. Fuller*, 11 S. Dak. 355, 77 N. W. 581, 74 Am. St. Rep. 815.

As in the above case, the extent of the court's territorial jurisdiction may be debatable; but that judicial writs have no force beyond the borders of the court's territory is established beyond dispute. *Needles v. Frost*, 2 Okl. 19, 35 Pac. 574; *Rathbun v. Ranney*, 14 Mich. 382; *Roads v. Symmes*, 1 Ohio 281, 13 Am. Dec. 621. Compare, also, *Lindley v. O'Reilly*, ante, 65.

In Kentucky absence of the statutory ground for sending the writ to another county is held to render the execution and sale thereon "voidable, but not void, and its validity is made to depend on the innocence of the purchaser." *Sanders v. Ruddle*, 2 T. B. Mon. 139, 15 Am. Dec. 148.

TOLEDO, WABASH & WESTERN RY. CO. v. REYNOLDS.

72 Illinois 487. (1874)

Garnishment on Judgment—Service out of County—Garnishment as a Suit—Statutes as to Residence Affecting Jurisdiction and Service of Process—Appearance—Form of Judgment.

Garnishment by L. Marks against Toledo, W. & W. Ry. Co., as garnishee of T. J. Reynolds, principal debtor. From judgment against the garnishee it brings error. Affirmed.

O. T. Reeves, for appellant.

P. E. Hosmer, for appellee.

The Court by Scott, J. In 1872, L. Marx recovered a judgment in the circuit court of Washington county, against Reynolds, on which execution was issued, and returned no property found. Marx then sued out a garnishee process against the railroad company, which was served on its agent in McLean county. A plea to the jurisdiction of the court was filed, to which the court sustained a demurrer. Plaintiff in error having elected to stand by its plea, the court rendered final judgment against it for the amount of the judgment, in favor of Marx, against Reynolds.

It is insisted a proceeding in garnishment is an original suit, and hence it is claimed it was not lawful to serve the garnishee process upon an agent of the company out of the county where the original suit was pending. The statute under which these proceedings were had seems to authorize the judgment creditor to have process directed to any county where any person may reside, who may have money or effects in his possession belonging to the judgment debtor. The statutory provisions are very broad and liberal. It is declared it shall be lawful for the court or justice of the peace before whom the original judgment had been rendered, to cause any person or persons supposed to be indebted to or to have any effects or estate of defendant, to be summoned forthwith to appear "before said court or justice of the peace as garnishee or garnishees." R. S. 1845, § 38, p. 307.

The remedy given by the statute is not limited. Any person, whether resident or not of the county in which the original judgment is rendered, may be summoned as a garnishee. It is not material, therefore, to determine whether a proceeding in garnishment is to be regarded as an original suit or [*489] a proceeding in the nature of execution of the original judgment. In either view, a court of general jurisdiction, by virtue of the statute giving the remedy, may send its process to any county in the state where the garnishee may be found. There is no difference between natural persons or corporations in this regard. Either may be summoned as garnishee. It is true, a justice of the peace can not send process beyond the territorial jurisdiction of such a court, as defined by statute.

The judgment in this case was obtained in the circuit court, and no reason is perceived why it could not send process of this character to any county in the state. The fact the garnishee is to be summoned to appear before the court which rendered the original judgment, excludes the idea the proceeding can be commenced in any other county. Any other construction would defeat the intention of the legislature in the passage of the act. Manifestly, it was the intention to give a remedy in exactly such cases as this, to facilitate the collection of debts.

The second error, however, is well assigned. The filing of

the plea to the jurisdiction was not a full appearance on the part of the company. Hence it was error to render final judgment on sustaining the demurrer to the plea to the jurisdiction of the court. The judgment should have been a conditional one, as upon default, and a *scire facias* should have been ordered returnable to the next term of the court, to show cause why the judgment should not be made absolute. R. S. 1845, § 16, p. 67.

For the error indicated, the judgment must be reversed and the cause remanded.

Judgment reversed.

This case arose under statutes providing as follows: "Any process which may be issued by any clerk of either of said courts (circuit and superior), or any judge thereof, in pursuance of law, shall be executed * * * in any county or place in this state * * *" [R. S. 1845, p. 149, § 48; R. S. 1877, p. 327 Ch. 37, § 29.]

"It shall not be lawful for any plaintiff to sue any defendant out of the county where the latter resides or may be found, except in local actions, and except * * * where there is more than one defendant. * * *" [R. S. 1845, p. 413, § 2; R. S. 1877, p. 734, Ch. 110, § 2.]

The decisions on this question are not entirely harmonious, and it will be seen how greatly they are affected by the statutes; but the rule stated above applies in most cases. Rood Garnish, § 237. If both parties are non-residents of the state the garnishment should be where the garnishee resides. *Stern v. Frazer*, Circuit J., 105 Mich., 685, 63 N. W. 968.

5. WHEN THE WRITS MAY BE EXECUTED.

Clearly, the writ must be issued before it can be executed; and, from this viewpoint, read again: *Gowan v. Fountain*, ante, 145, and *Hargan v. Burch*, ante, 177. As to liability of the officer for delay, read again: *Albrecht v. Long*, ante, 333; *Commonwealth v. Magee*, ante, 307; *Burk v. Campbell*, ante, 343; and *Ledyard v. Jones*, ante, 344. As to the effect of delay on the authority conferred by the writ, and the validity of the acts done under it, read again: *Commonwealth v. Magee*, ante, 307; *Smith v. Osgood*, ante, 318; and *Colyer v. Higgins*, ante, 346.

6. WHO MAY EXECUTE THE WRITS.

Under this head prepare again: *Gordon v. Camp*, ante, 296; *Menderson v. Specker*, ante, 298; *Burton v. Wilkinson*, ante, 316; *Boucher v. Wiseman*, ante, 332; *Albright v. Long*, ante, 333; and *Colyer v. Higgins*, ante, 346.

McMILLAN v. ROWE.

15 Nebraska 520, 19 N. W. 504. (1884)

Execution—Who Levy—Validity of Sale—Collateral Attack.

The Court by Cobb, C. J. This was an action of trespass *de bonis asportatis* by William S. Rowe, plaintiff, against George McMillan, Curtis Hull, Gibson Keith, and Chris. Kochler, defendants.

It seems that Rowe, the plaintiff, was the owner of a quantity of barley; that McMillan and Hull had a judgment against said Rowe rendered by one Vandervoort, a justice of the peace; that the defendant, Gibson Keith, assuming to act as a constable, with the execution issued by said justice Vandervoort upon the said judgment in his hands, seized and took as upon execution the said barley of the defendant, advertised and sold it as upon said execution, and that the same was bought, taken, and converted to his own use by the defendant Chris Kochler. This was the cause of action stated in the petition. * * * [*521]. Upon the trial to a jury, a verdict was found for the plaintiff and against all the defendants for \$118.98. * * *

The only points made by plaintiffs in error in their brief are: *First*, The judgment creditors, McMillan and Hull, are not responsible for anything done by Keith, even if he was a trespasser, as he acted without their request or knowledge. A thorough examination of the bill of exceptions fails to show that these defendants, McMillan and Hull, or either of them, or any attorney claiming to act for them, had anything whatever to do with the issuing of the execution, its service, or return, nor is there any evidence that they received the money made thereon. Had there been such

evidence, as one member of the court, I should be of the opinion that such receipts would render them responsible for the acts of Keith in taking the barley upon this execution; but there being no such evidence, the verdict as to them is not sustained. *The other point is*, that the statute directing how a justice of the peace may appoint [*523] a special constable is not the exclusive mode; the power existed at common law, and the issuing and delivery of the execution were sufficient. We cannot agree to this proposition. The authorities cited fail to sustain it. I do not think that there exists at common law any authority in a justice of the peace to appoint a constable to serve civil process. That such authority existed to appoint special constables to serve criminal process in certain cases is admitted. In this case there is no evidence of the appointment of Keith as constable to serve the execution either verbally or in writing; indeed, it would seem very clear from the testimony of Vandervoort, the justice who issued the execution, that he understood Keith to be a constable, and that no appointment was desired or necessary. The provision of the statute of this state on the subject of deputizing persons by justice of the peace to serve process is as follows:

"A justice, at the request of a party, and on being satisfied that it is expedient, may specially depute any discreet person of suitable age and not interested in the action to serve a summons or execution with or without an order to arrest the defendant or to attach property; such deputation must be in writing on the process." Code, § 1094.

This statute is, in my opinion, exclusive of any other method of appointing persons to act as special constables in the service of civil process. Its provisions not having been followed, it is no protection to either Keith or Kochler—to the one in seizing and selling the barley in question, or to the other in buying it at the sale. The judgment of the district court as to the defendants McMillan and Hull is reversed, but without costs; and as to the defendants Keith and Kochler, the said judgment is affirmed.

Judgment accordingly.

In a trial between plaintiff relying on a purchase under a *fi. fa.* in his favor, and a claimant of the property, plaintiff offered in evidence the *fi. fa.* with the endorsement thereon. The evidence was objected

to "because said entry on said fi. fa. was made by another [than the officer] and he could not delegate his authority to a private person." The court said: "It appears from the evidence in this case that the entry on the fi. fa. was written out by Greer in the presence of, and by the direction of Hawkins, the levying officer, who was unable to write, and that the officer signed said entry with his mark after the entry was made by Greer. A levy is required to be entered on the process by virtue of which the levy is made, but we do not regard it as necessary that it should be in the handwriting of the officer." *Cox v. Montford*, 66 Ga. 62.

Unless given by statute, the sheriff has no more power to serve process beyond his county than a person without office. When a sheriff levied on and sold a railway running through his county into another and a bill was filed by the purchaser seeking to redeem from a mortgage on the property, the court held that the complainant had no title because the property was sold entire and the sheriff had no authority beyond the borders of his county. *Benson v. Smith*, 42 Me. 414, 66 Am. Dec. 285. Compare *Oldfield v. Eulert*, 148 Ill. 614, 39 Am. St. 231.

WALES v. CLARK.

43 Connecticut 183. (1875)

Execution—Levy Before Receiving Writ—Effect.

Assumpsit in superior court of New Haven. Defendant pleads to the jurisdiction that there was no personal service and that the only service was by a deputy sheriff filing a certificate of levy upon lands when he had not and never had had any original writ, and that he did not receive any such writ till the day after the certificate was filed. Plaintiff demurred, and the court reserved the question for the advice of this court. When the deputy filed the levy, he had a telegram requesting him to do so, and stating that the writ had been mailed to him.

The Court by Carpenter, J. The question in this case is one of jurisdiction. Both parties are non-residents, and no personal service was made on the defendant. In such cases the *situs* of the property attached determines the jurisdiction.

Was there an attachment? Or, stating the question in another form, can an officer make a valid attachment of real [*186] estate, before the precept, by virtue of which the attachment is made, is placed in his hands? The statute is as follows: "Real estate shall be attached by the officer's lodging with the town clerk of the town in which the land is situated, a certificate that he has made such attachment, * * * and said attach-

ment, if completed as hereinafter provided, shall be considered as made when such certificate is so lodged." The remainder of the section prescribes the substance of this certificate, and provides that the officer shall, within four days thereafter, leave with such town clerk a full and certified copy of the process under which the attachment is made. Gen. Statutes, 1866, p. 4, § 17.

This statute was passed in 1855; and the lodging of a certificate is a substitute for the old mode of attachment, which was by an entry on the land. The officer who had a writ of attachment to serve went upon the land and that constituted the attachment. The attachment is now made by lodging with the town clerk a certificate, and it is expressly provided that the attachment takes effect when the certificate is so lodged. Under the old statute, an entry without a process was clearly ineffectual; under the present, the lodging of a certificate before the process is received is equally invalid.

The power and duty of an officer depend upon his possession of the process. The latter may be qualified, or the officer may be relieved of it altogether, by instructions; but it exists only while the power exists, and both come into existence when the process is placed in his hands. Until then he has no authority to act, and cannot be justified in interfering with the persons or property of others.

It will hardly be pretended that an officer will be justified in making an arrest in a civil suit before he receives a precept commanding him to do it; nor can he take personal property in anticipation of a writ of attachment. In such cases he must be prepared, if his right is challenged, to produce his authority. If he cannot do it he is a trespasser and may be resisted as such.

The land in New Haven county was not otherwise attached than by the officer's lodging with the town clerk the required [*187] certificate on the day before he received the writ. It follows that there was no valid attachment, and the superior court must be advised that it has no jurisdiction of the case.

"This is a plain case. Without a writ of attachment, the sheriff of Story county had no authority or right to notify the appellant that he was attached as garnishee, nor to take his answers to the interrogatories. * * * The district court has no more power to render a judg-

ment upon a notice given and answers thus taken and returned than if the same thing had been done by a justice of the peace, notary public, a road supervisor, or a private individual." Judgment against the garnishee reversed. *Van Fossen v. Anderson*, 8 Iowa 251.

SINGLETERY v. CARTER.

1 Bailey Law (South Carolina) 467, 21 Am. Dec. 480. (1830)

Sheriff's Deed, Validity on Collateral Attack—Service of Process by Party, in Interest or Nominal—Service by Deputy of Party.

Trespass to try title to land sold as defendant's property by the sheriff under a *fi. fa.* on a judgment in favor of the present plaintiff and others, and purchased by the plaintiff. The judgment and execution were produced, and the levy, sale and execution of the sheriff's deed to the plaintiff proved. The levy was made by one of the plaintiffs in the execution, and was objected to as irregular and void on that ground, but the trial court overruled the objection, and the jury found for the plaintiff. The defendant now moved to set aside the verdict as contrary to law. Motion granted.

The Court by Colcock, J. Without going into a consideration of all the grounds taken in the brief, we are of opinion that the motion must be granted on the first, viz.; that the deputy, who made the levy, was one of the plaintiffs in the execution. The law wisely foreseeing that the ministers of justice should be freed, as far as practicable, from all the improper bias which may result from self-interest, has declared that no man shall be his own officer, and that no one shall in his own person, and by his own hand, do himself right by legal process. Therefore, when the officer is interested, it declares that another shall act; and this, in principle, applies to all, though to some with greater, to others with less force.

A distinction has been attempted, as to the nature of the process, and the degree of interest; but I am inclined to support the broad ground as the safest, and to say that no officer, who [*468] is interested in a suit, shall serve any process appertaining to it, from the commencement to the conclusion. * * *

I am aware that it is said in some of the old cases, five or six hundred years ago, that it was doubted whether a sheriff could

serve a writ in which he was interested; but these doubts, I think, must always have been unfounded. The common law has been eulogized as a system of reason and justice, adapted to the exigencies of society. Now I ask, whether a proposition can be stated, which would be more universally concurred in, than that no officer should be permitted to act in his own case. I know of none, which I think should be more general in its application, I would say, from a constable to the president of the United States. At this very sitting we set aside a renunciation of dower, because the justice of the quorum, by whom it was taken, was interested in the transaction, although for his children merely, and not for himself. And in the case of *May v. Walters*, 2 M'C. (S. Car.) 470, it was held that the service of a writ by the deputy of the plaintiff, who was sheriff, was void; in which all the judges concurred, except Mr. Justice Gantt, who dissented on the ground that the sheriff was only the nominal [*469] plaintiff. The doctrine is, however, supported by some of the old authorities, as in *Done v. Smethier*, Cro. Car. 416; *Wimbish v. Willoughby*, 1 Plowd. 73. There can be no distinction made between a deputy and the sheriff in such cases; they are equally embraced in all the reasons of the law, and are in fact identified. In *Gage v. Graffam*, 11 Mass., 181, it was laid down, that process served by a deputy sheriff, where another deputy of the same sheriff is a party, will be set aside on motion. The motion is granted and a new trial ordered, because as the levy was illegal, the sale was consequently void, and the plaintiff's title was not proven.

Motion granted.

To the same effect on similar facts, *Collais v. McLeod*, 8 I.ed. L. (N. Car.) 221.

HEYER & CO. v. MOODY & CO.
67 Texas 615, 4 S. W. 242. (1887)

Execution—Who Levy—Conflict of Jurisdiction—Sheriff and Deputy.

Action to try title to money in court. Judgment for defendants. Plaintiffs appeal. Reversed.

McLemore & Campbell and *G. E. Mann* for appellants.

Thomas J. Gibson for appellees.

The Court, by *Willie, C. J.* On November 15, 1881, Oliver

& Griggs sued out a writ of attachment against Bessling & Roller, which was on the same day levied by T. E. Jackson, sheriff of Limestone county, upon a stock of goods in Groesbeck, and on the next day upon a stock of goods in Mexia. After levying upon the Mexia stock the sheriff returned to Groesbeck, leaving that stock in the storehouse in which it was contained, and its key in charge of three persons, with instructions to close the doors and make an inventory of the goods.

Before leaving Mexia the sheriff was told that other attachments [*617] would soon be there, to which he replied that J. M. Waller (who was a constable and also Jackson's deputy) could serve any process that could be served by the sheriff. After Jackson had left, a writ of attachment in favor of Gust Heye & Co. against Bessling & Roller was placed in the hands of Waller, who levied the same on the stock of goods in Mexia. Waller's return showed that the writ was levied by him upon said stock on November 16, at eleven o'clock, as per inventory filed, subject to the levy of the attachment of Oliver & Griggs, and it was signed, "T. E. Jackson, sheriff of Limestone county. J. M. Waller, deputy." On the nineteenth, Waller delivered the attachment to the sheriff, who filed it with the papers of the cause. Jackson reached Groesbeck on the sixteenth, and an attachment in favor of W. L. Moody was on the same day placed in his hands for levy. His return upon this writ showed that he levied it upon the Groesbeck stock at one o'clock p. m., and on the Mexia stock at half past two o'clock p. m., of that day, subject to the Oliver & Griggs attachment.

All of the attaching creditors obtained regular judgments upon their claims at the same term of the court. The sheriff sold the two stocks under order of court, and, after paying off the judgment of Oliver & Griggs, returned the balance of the proceeds of the sale, viz., eighteen hundred dollars, into court; and the present action tests the question as to whether this money shall be paid to Gust Heye & Co. or to W. L. Moody & Co.

The court below held that the goods, when levied upon under the attachment in favor of Oliver & Griggs, were *in custodia legis*, and could not be attached by another officer, though

a deputy of the officer by whom the first levy was made; that the sheriff in possession alone could make such a levy; that the acts of the deputy were not by construction the acts of the sheriff, unless adopted and ratified by him, and that there was no such ratification. Upon this view of the law, judgment was rendered for W. L. Moody & Co., and this appeal is taken by the appellant from that judgment.

It is a general principle that goods attached by one officer and in his possession, can not be attached by another officer. The question whether it was rightly applied by the court below in the present case depends upon whether the sheriff and his deputy were different officers. Our statutes provide that sheriffs shall have power, by writing, to appoint one or more deputies, who shall have power and authority to perform all the acts and duties [*618] required of their principals. Rev. Stat., Art. 4520. All writs, including attachments, are directed to the sheriff or any constable, but may be executed by a deputy sheriff, who makes his return in the name of his principal. So far as the public is concerned, there is no difference between the powers and duties of the sheriff and his deputy; either can perform and can be compelled to perform the same acts that are required of the other. When a writ reaches the hands of a deputy it is in fact received by the principal. He is liable for its proper enforcement, and for all acts done by his deputy under its authority. If goods are tortiously seized under it by the deputy, the principal can be sued by the owner; if they are illegally disposed of by the deputy, the principal is responsible.

As between the sheriff and the deputy, of course the former can make the latter responsible for such losses or misconduct, but with this the public has no concern. It follows that as to the public, whose servants these officers are, the acts of the deputy are the acts of the principal—the possession of the former is the possession of the latter. So far as the responsibilities of the office are concerned, the sheriff is liable for the acts both of himself and his deputy; so far as its rights and duties are concerned they are in every respect identical. This is not only the true construction of our statute, but is clearly the rule at com-

mon law. Bacon's Abridgement, title Sheriff; Comyn's Digest, title Officer; Gwynne on Sheriffs, 43; Murfree on Sheriffs, § 18.

The acts of the deputy are performed in the name of the principal, and they become so essentially the acts of the latter that he may lawfully return that they were done by himself. Freeman on Executions, § 384. From these principles we can but conclude that the act of Waller in making the levy upon the Mexia stock of goods was the act of the sheriff and amounted to the same thing as if he had made the levy himself. As the goods were in the possession of the sheriff under a former attachment, it was of course proper for him to levy the subsequent writ of Gust Heye & Co. upon it, subject to the previous levy of Oliver & Griggs.

We are cited to no authorities by the appellee which sustain the ruling of the court below, that the sheriff and his deputies are different officers and that the possession of attached goods by the one is not the possession of the other. In the case of *Vinton v. Bradford*, 13 Mass. 116, 7 Am. Dec. 119, it was held that [*619] the deputies of the same sheriff are different officers as to each other; but it had been held by the same court in *Watson v. Todd*, 5 Mass., 273, that the possession of a deputy was the possession of the sheriff. This doctrine of the last named case was sanctioned by the former, and it was added that the possession of the deputy being the possession of the sheriff the latter could levy a second writ upon goods attached by the deputy, the same being constructively in the possession of the sheriff.

If the possession of the deputy is the possession of the principal, it is because they are, in the eye of the law, identical in so far as the duties of the office of sheriff are concerned. If so, the acts of the former are the acts of the latter. Waller's levy of the attachment of Heye & Co. was therefore the levy of Jackson, and was under the authority of law made upon goods in the possession of Jackson. It is proper to add that the New England cases differ, as to the position which the sheriff and his deputies occupy towards the public, from the decisions of other states, probably on the ground that they are there treated in

many respects as if they did not hold the same office. A deputy is liable directly to a party aggrieved by his misconduct; and he and the sheriff can not be sued as joint trespassers, and in at least one of these states process is directed both to the sheriff and his deputy. Murfree on Sheriffs, §§ 907, 938; *Odiorne v. Colley*, 2 N. H., 66.

To hold as the court below did in this case that a deputy can not levy upon goods already attached and in possession of the sheriff would be to deprive the public of the benefit of a deputy's services whenever a second attachment was to be levied. The goods already attached being in the possession of the sheriff, no matter whether levied by a deputy or not, could not afterwards be subjected to another levy, except by the sheriff himself. Deputies are appointed as well for the benefit of the public as of the principal sheriff, and their powers must not be so construed as to deprive the public of their services in any respect.

It may be added that in this case the sheriff ratified the act of his deputy in making the levy for Heye & Co., and adopted it as his own by filing his return as made among the papers of the cause.

We are of the opinion, therefore, that Heye & Co.'s attachment having come to the hands of Waller, the deputy, prior to the time that Moody & Co.'s writ reached Jackson, the sheriff, and having been levied upon the Mexia stock previous to the latter writ, was entitled to priority, out of the proceeds of the goods [*620] sold under the Oliver & Griggs attachment. This priority of levy upon the Mexia stock gave Heye & Co. the right to have its proceeds applied to their debt next after Oliver & Griggs were satisfied. Immediately upon the making of their levy they were entitled to require Oliver & Griggs to exhaust the Groesbeck stock, upon which there was no other writ levied, before levying upon the Mexia stock, upon which they held an attachment lien. This right was not changed by any subsequent levy upon the Groesbeck stock by Moody & Co. They could not, by acquiring a subsequent lien, impair or interfere in the least with the extent of the right of Heye & Co. to have their lien satisfied out of the Mexia stock. This would, however, be the

result if the levy of appellees upon the Groesbeck stock is to affect the previous levy of the appellants upon that in Mexia.

* * *

Reversed and rendered.

7. FOR WHAT THE GARNISHEES MAY BE CHARGED.

Under this head prepare again: *Chicago, R. I. & P. Ry. Co. v. Sturm*, ante, 71; *Allen v. Hall*, ante, 140; *Bates v. Chicago, M. & St. P. Ry. Co.* ante, 245; *Waterbury v. Board of Commissioners*, ante, 256; *Buchanan v. Alexander*, ante, 265; *Burnham v. Doolittle*, ante, 273.

BROWN v. DAVIS.

18 Vermont 211. (1846)

Property Which Might Be Seized, Liability to Garnishment—Character of Possession Necessary—Right to Retain.

Trustee process by Jerusha Brown against Josiah Davis, principal debtor, and against James M. Hacket as his trustee. Judgment for plaintiff. Trustee excepted. Affirmed.

The trustee disclosed, at the June term, 1844, of Addison county court, that he had no goods, etc., of the principal debtor, Davis, in his hands, or possession, except that in the preceding March, Davis had permitted the trustee to take a wagon, belonging to him, to use; that he did not purchase the wagon, nor agree upon any price for the use of it; that Davis had controlled the wagon when he pleased, and the trustee had used it in his business, when necessary; that the trustee had no claim upon the wagon, nor any right to use it any longer than Davis should choose to leave it in his possession; and that the wagon was, at the time of disclosure, on the premises of the trustee, subject to the control of Davis, or of any other person, who could legally claim it.

P. C. Tucker, for trustee.

J. Pierpoint, for plaintiff.

The Court by Kellogg, J. The main objection, urged

to the maintenance of this suit against the trustee, is that the wagon was not so *intrusted* or *deposited* with the trustee, but that it might have been attached by the ordinary process of law, and consequently that Hacket ought not to be adjudged trustee. And we are referred to two cases in Massachusetts as sustaining this proposition. In *Allen v. Meguire*, 15 Mass. 490, the court say, "If the specific articles, which the supposed trustee has in his possession, might be come at to be attached, the trustee process is not the proper remedy; for that will lie only, where the goods, etc., cannot be come at to be attached by the ordinary process of law." In that case the trustee claimed that he had a lien upon the property, though in fact he had none; and of course the property might have been attached by the ordinary process of law; yet the court held that he was trustee, inasmuch as he claimed a lien upon the goods, when he had none, and inasmuch as he did not disclose any thing, from which it might be inferred that [*214] he exposed them to attachment. The court seem to have attached importance to the fact, that the trustee did not expose the property to attachment, and it may be inferred from the case, that, had not the trustee claimed a lien upon the property, and had he offered it to the officer to be attached, he would not have been held as trustee.

The case of *Burlingame v. Bell*, 16 Mass. 320, is an authority to the same effect as the case last cited. It is a sufficient answer to those cases, that the decisions are founded upon the peculiar provisions of the statute of Massachusetts regulating trustee process, which is essentially different from that of this state, and consequently can have no legitimate bearing upon the case at bar. By their statute it is, in express terms, made indispensable to the maintenance of the trustee suit, that the property should be so *intrusted* or *deposited in the hands of the trustee, that the same cannot be attached by the ordinary process of law*. No such provision is to be found in our statute. In the absence of any adjudged cases which are in point, the question before us must be determined by reference to our statute regulating the trustee process.

We think the case at bar is clearly within the letter and spirit of the statute, and that Hacket was properly adjudged trustee.

Consequently the judgment of the county court is affirmed.

The peculiarity in the statute of Massachusetts is in the title which reads: "An act to enable creditors to receive their just demands out of the goods, effects and credits of their debtors which cannot be attached by the ordinary process of law." Laws, Mass. 1794, Ch. 64. Compare *Wilson v. Harris*, 21 Mont. 374, 54 Pac. 46, where the whole question is discussed by a divided court. Upon the same point see also *Hooper v. Day*, 19 Me. 56, 36 Am. Dec. 734.

I am aware of no other decisions not in harmony with *Brown v. Davis*. In both the Massachusetts cases above cited the garnishee was charged.

FIRST NATIONAL BANK v. DAVENPORT & ST. PAUL RY. CO.
45 Iowa 120. (1876)

Garnishment—Character of Possession Necessary to Render Garnishee Chargeable—Servant as Garnishee of Master.

Judgment being recovered by the First Nat. Bank against the Davenport & St. P. Ry. Co. and the Davenport Ry. Con. Co., J. S. Conner was summoned as garnishee under an execution issued thereon. From an order discharging said garnishee plaintiff appeals. Reversed.

Grant & Smith and *C. Whitaker*, for appellant.

Brown & Campbell, for appellee.

The Court by Day, J. * * * The answer of the garnishee shows that he was auditor and cashier of the operating department of the Davenport Railway Construction Company. As auditor he had charge of the accounts, examined agents' reports, and kept the books. As cashier it was his duty to examine and receipt for the cash remitted by the agents, to make collections from the roads, and to cause anything to be done necessary to the prompt and regular collection of the earnings of the road, and to make such disposition of the cash in hand as he was directed to make from time to time by the general manager, Smith. At the time of his garnishment he had on hand, of money so received, belonging to the operating department of the Davenport Railway Construction Company, \$3,443. This money was kept in a safe provided by the construction company, to which the garnishee alone had a key.

The garnishee claims that he is not liable because he did not have independent control of the money, but was under obligation to dispose of it as directed by his superiors. The position of appellee cannot be better expressed than in the following quotation from the argument of his counsel: "The fallacy of the plaintiff's argument consists in assuming that the garnishee had these moneys in his *possession and in his custody or under his control*, a fact which has not only not been proved, but the contrary most clearly and distinctly appears. The possession and *control* of property contemplated by the statute, does not mean the mere physical power to take possession of it and carry it off; but the independent possession—the present and immediate rightful custody of it, including the right to retain that possession, and to maintain that custody and control of it. [*128] The law does not require that the garnishee should commit a trespass, or a gross breach of faith, in order to obtain or retain possession of the attached property."

Appellee, in assuming that the possession which will warrant the process of garnishment must be an independent possession, coupled with the right to retain possession and maintain custody and control is, we think, clearly in error. Aside from express contract, one does not obtain such possession and control of the property of another. Suppose a party makes a simple deposit of money in a bank, without any agreement as to the time the deposit shall remain. The bank holds the money entirely subject to the control of the owner. It cannot rightfully hold the money an hour after the owner has directed it to be paid out. Yet it cannot be questioned that, while the money remains in the bank, the bank may be garnished. Suppose garnishment process served upon the bank, and that afterward the owner orders the money to be paid out in a particular way. Does the bank commit a breach of faith in holding the money, and refusing to dispose of it as directed by the owner?

The fallacy of the appellee's argument is in placing the duty of the garnishee to his principal above his duty to obey the mandate of the law. It may be conceded that the answer of the garnishee fully discloses that it was his duty to pay out the money in his possession as ordered by Smith; but the process of the court

imposed upon him a paramount duty to retain it in his possession, and an obedience to that order would not render him a trespasser, nor involve him in a breach of faith. We think appellee's counsel concede enough to establish the liability of this garnishee. In their argument they say: "We do not take the ground * * * that Conner cannot be held because he was an employe, and not an officer of the corporation. An employe may clearly have such possession—such custody and control of the property of his employer as to subject it to garnishment in his hands. It depends altogether upon the nature of the employment. For instance, the agent of a railroad at one of its stations certainly has the unqualified and independent possession [*129] and control of the moneys of the company which come into his hands. He is only an employe; yet the nature of his employment and of his duties may, and probably would, render the moneys in his hands subject to garnishment. He has the independent possession, control and custody of those moneys; while the cashier whom the company might employ to assist him in his work, by looking after and keeping accounts of those moneys, would not have any such possession and control of them."

Yet, these station agents are subordinate to the garnishee in this case, and are required to remit to him the moneys by them collected. Suppose such an agent had been garnished, and he had immediately been removed, and ordered to pay over all the moneys in his hands to Conner. Could he afterward retain the money without a gross breach of faith? If he could, we are unable to see why the garnishee in this case may not do the same; and if he could not, it is apparent that a railway company may, at pleasure, render the process of garnishment unavailing. We are satisfied that the appellee had such custody and control of the money in question as to render it subject to garnishment in his hands. He should have retained that possession, and held the money subject to the order of the court. In failing to do so he has magnified his duty to his employer, and has ignored his obligations to the law. The court should have held him liable upon his answer.

Reversed.

It is believed that the above decision announces the correct rule,

and it is supported by the weight of authority. See review of decisions in *Rood, Garnish*. §§ 42 and 43. But in cases of this exact kind, decisions to the contrary will be found in Pennsylvania, Maine, Tennessee, Kentucky and Missouri. *Fowler v. Railway Co.*, 35 Pa. St. 22; *Sprague v. Steam Nav. Co.* 52 Me. 592; *Wilder v. Shea*, 13 Bush. (Ky.) 128; *Mueth v. Schardin*, 4 Mo. App. 403.

The character of the conflict in the authorities will be seen by reading the following abstract from a decision reversing a judgment against a treasurer of a railroad company as garnishee of the company: "It is not every kind of holding that constitutes the possession designated, nor every possibility of power over the property that gives the control necessary to make it garnishable. The servant who rides his master's horse to water, or keeps the keys of the stable, and has access to and power to take and use the horse, has not the garnishable possession and control, by reason merely of such custody and power. And so, too, the clerk in the store, who has access to the merchant's safe, and has charge and sale of the merchant's goods, and the power to receive and pay out money from the drawer or safe, has not, by reason merely of such charge and power, the garnishable possession and control of the merchandise and money. Such custody and power may exist with the clerk, and still, the merchandise and money not be in his possession and control in such wise as to make them the subject of garnishment in his hands. The custody and power must go beyond such occupation or holding and service, to constitute the garnishable possession and control. Where to draw the line, and precisely to define the rule, is difficult and not safe to attempt—upon one side of which exists, and on the other side does not exist, the garnishable condition of the properties. It is safe, however, to say, that mere employment in the service of the owner, in and about his properties, and the physical power, by reason of such employment, to handle, remove, return such properties, to receive and pay out moneys of the owner, do not constitute the possession and control of the properties contemplated by the law of garnishment. Though such employment gives a degree of physical power over the properties, the possession and control exist with the owner, and not with the employe or servant. Of course such employment may exist, under circumstances with relation to the properties, as to invest the employe with such possession and control as to make them the subject of garnishment in his hands. It is obvious enough, that employment and possession of the garnishable character, may co-exist. But where the actual and substantial possession is with the owner, and the relation of the servant or employe to the properties is such only as is incident to the employment and service, the properties are not subject to garnishment as being in the possession or control of the servant or employe.

"The servant who feeds and waters and curries the master's horse, and keeps the key of the stable, the master having the actual and dominant possession and control; the clerk who opens and shuts the store, and sells the goods, and has charge of the keys of the money drawer

and safe, subordinate to the actual possession and control of the merchant; the treasurer of the corporation, who has charge of the safe and the moneys therein, and receives and pays out under the immediate direction and control of the principal corporate officers, are not deemed in such possession and control of the properties, as subjects them, the employes and properties, to garnishment. In such and the like cases, the question is, whether the actual and substantial possession is with the employe, or whether his relation to the properties is merely of employment and service, while the real possession and control is with the owner or some other?" *McGraw v. Memphis & O. Ry. Co.*, [1868] 45 Tenn. (5 Coldwell) 434.

GUTTERSON v. MORSE.

58 New Hampshire 529. (1879)

Garnishment—Character of Possession Necessary to Render Garnishee Chargeable—Possession of Legal Title—Fraudulent Conveyance, Estoppel—Garnishee's Liability for Property Destroyed after Service—Costs.

Foreign attachment. Defendant deeded his farm and gave a bill of sale of his personal property to the trustee to defraud creditors, but retained physical possession and control of the land and of all the personal property except a yoke of oxen.

Mugridge, for plaintiffs.

A. L. Norris and Fowler, for trustee.

The Court by Doe, C. J. The sum of \$80, received by the trustee for the ox he sold, is held by the attachment. *Pittsfield Bank v. Clough*, 43 N. H. 178. He is not chargeable for the property of which he did not have possession when the writ was served on him, or afterwards. Gen. St., c. 230, s. 28. When a trustee is adjudged chargeable for any specific articles in his possession, the execution, issued against the defendant, contains a precept to levy the same thereon; and if the trustee neglects or refuses to deliver the articles to the officer having the execution, on request, execution is issued against him, upon notice, as for his own debt, for the value thereof. Gen. St., c. 230, ss. 38, 39. He is required to deliver the articles to the officer, not because the duty of taking possession of them is imposed upon him by the service of the writ, but because of the service of the writ attaching them in his possession, he is made trustee, and, for some purposes, his possession is made the custody of the law. By direct attach-

ment, the plaintiffs, avoiding the bill of sale, might acquire a lien upon the property whether found in the defendant's or the trustee's possession. In this process of foreign attachment, the trustee can be required to give up property of which the attachment made him legal custodian, and of which he has no title or right of possession that he can assert against the plaintiffs; but he cannot be required to give up what he never had, or what, being returned to the defendant before the attachment, has remained in the defendant's possession.

The plaintiffs contend that the defendant carried on the farm as agent of the trustee, and that the defendant's possession of the farm and personal property was the trustee's possession. But the defendant's agency was a pretense, and a part of the fraudulent transaction. By trustee process, B is not made the trustee of A's chattels, on the ground that they are A's property, in A's possession, under cover of a fraudulent sale to B, and a fraudulent agency of A. Fraud, in this case, might invalidate the bill of sale and the title founded thereon; but the fiction of the defendant's agency did not transfer the possession of the defendant's property from the defendant to the trustee so as to make the trustee chargeable for such property in this equitable proceeding. There being no consideration for the conveyance, and the purpose being to defeat the defendant's creditors, the defendant's agency was feigned. The trustee's title and the defendant's agency were a cover which may be removed from the defendant's chattels in the defendant's possession. The trustee cannot be charged for them [*531] if the cover is not removed. Its removal does not show that the simulated agency was a real one.

It is argued that the trustee is estopped to deny his possession and the agency which he set up as a cover for the defendant's property. But the plaintiffs were not induced to change their position by their reliance upon a possession held by the trustee through the agency of the defendant. On the contrary, they brought this suit relying upon the fact that there was no such agency and no such possession. It is a part of the plaintiff's case that such agency and possession, which did not exist if the trustee had no title, were as unreal as his title.

It does not appear that the plaintiffs can, by this process, obtain anything of value from the ox that died in the trustee's possession.

The trustee is liable for costs on the ground of fraud. Gen. St., c. 230, s. 43; *Kent v. Hutchins*, 50 N. H. 92.

Trustee charged for \$80 and costs.

AVERY v. MONROE.

172 Massachusetts 132, 51 N. E. 452. (1898)

Garnishment—Character of Possession Necessary to Render Garnishee Chargeable—Assignment for Benefit of Creditors—Presumptions.

Trustee process. Trustee charged and excepts. Affirmed. *F. W. Blackmer & E. H. Vaughan*, for trustee.

A. A. Wyman, for plaintiff.

The Court by Holmes, J. At the time of the service of the writ in this action the person sought to be charged as trustee had accepted from the principal defendants a conveyance of all their property not exempt from attachment, consisting mainly of machinery, supplies and stock on hand in a shoe factory, and book accounts, in trust for the defendants' creditors, but had done nothing about [*133] taking possession of the property. No creditors appear to have become parties to the deed. The question before us is whether these facts warranted the superior court in charging the trustee.

The title had passed as between the parties to the deed. The trustee had the right to the immediate possession. We do not see why he was not as well "able to turn it out, to be disposed of on execution," (*Andrews v. Ludlow*, 5 Pick. 28, 31) as if he had taken possession by a formal act. The case of *Viall v. Bliss*, 9 Pick. 13, seems probably to have been similar to this, and in Maine it seems settled that in cases like the present the trustee is to be charged. *Lane v. Nowell*, 15 Maine, 86. *Arnold v. Elwell*, 13 Maine, 261. *Peabody v. Maguire*, 79 Maine, 572, 584. *Glenn v. Boston & Sandwich Glass Co.* 7 Md. 287. See also *Mechanics' Savings Bank v. Waite*, 150 Mass. 234, 235; *Cushing, Trustee Process*, §§ 53-55; *Drake Attachment*, (7th ed.) § 482; *Freeman, Executions*, (2d ed.) § 160. Section 29 of Pub. Sts. c. 183, is not intended to

limit the liability of trustees under deeds like this to cases where they have taken possession, but simply to declare the existing law that they may be charged by trustee process under § 21. Rev. Sts. c. 109, § 35, Commissioners' note. We are of opinion that the property was "intrusted in the hands" of the trustee within Pub. Sts. c. 183, § 21.

It is suggested that it does not appear from the trustee's answers to interrogatories that all the defendants had executed the deed before service of the writ. It does not appear that they had not. The deed was executed, and, if it be material, may be presumed to have been executed by all three of the defendants on the day of its date, as it certainly was by two of them.

Exceptions overruled.

The early Massachusetts cases are in accord with *Gutterson v. Morse*, ante. See opinion by Shaw, C. J., in *Osborne v. Jordan*, 3 Gray 277. *Avery v. Monroe* is the strongest case reported. There are several late cases tending in the same direction. But *Gutterson v. Morse* is believed to announce the rule which would be followed in most states. See collection of all the principal cases in a review of *Avery v. Monroe* in *American Law Review* May-June, 1899; Rood, *Garnish*. § 52.

SMITH v. MENOMINEE CIRCUIT JUDGE.

53 Michigan 560, 19 N. W. 184. (1884)

**Garnishment of Mortgagee—Mortgagee's Right to Retain Possession—
Officer's Rights and Duties—Manner of Sale—
Application of Proceeds.**

Mandamus by James D. Smith and another, against C. B. Grant, circuit judge. Granted.

B. J. Brown, for relators.

M. V. & R. A. Montgomery, for respondent.

The Court by Cooley, C.J. On February 7, 1883, one Canterbury brought suit in the circuit court for the county of Menominee against one McClintock, and garnished the relators as having in their hands property of McClintock. Judgment was recovered in the principal suit, and the garnishees disclosed that they were in possession of certain goods and chattels of the estimated value of \$6,000, as mortgagees of McClintock, under a mortgage given to secure the payment of \$4775, all of which was due and unpaid. The garnishment suit appears to have been

brought to trial before a jury, who returned a verdict that the garnishees had property of McClintock in their hands which was of the value of \$7,000, and had a lien upon it to the amount of \$4,772.69. Thereupon the circuit court made an order * * * [appointing a receiver of the property, directing the garnishees to surrender it to him, and directing him to sell the same at public auction and apply the proceeds, (1) to paying the costs of the sale, etc., (2) to the payment of the garnishees' mortgage, and (3) to return the balance into court to apply on the judgment of the garnishing creditor].

The garnishees complain of this order, and apply in this proceeding for a writ of mandamus to require its vacation. Several objections are made to it, but only those will be noticed which appear to us to require examination for the purposes of a decision of the case now before us.

The statute (How. Stat. § 8064) contemplates that the court, when it shall appear that the garnishee has in his possession [*562] property belonging to the principal defendant, will appoint a commissioner or receiver to collect and apply the proceeds upon any execution in favor of the plaintiff and against the garnishee.
* * *

We have grave doubts of the right to take from a mortgagee of chattels the property upon which he has a lien, except where, for the protection of the rights of others, the necessity shall be apparent. It is a serious interference with his contract rights. It is a part of his security that the mortgage gives him authority to take the property into his own possession; and nothing which may subsequently be done by or against the mortgagor can rightfully diminish or affect this security. When a resort to legal remedies becomes [*563] essential, all parties concerned may be required to submit to some inconvenience, and perhaps to some loss; but in a case where, as in this case, the legal remedy is only sought for the purpose of reaching a surplus after a lien is satisfied, and the lienholder is not concerned in the controversy, it cannot be rightful to make the burden or the cost of the litigation fall upon him, or to take from him substantial rights for the convenience of the parties litigant.

In this case the plaintiff, after obtaining his judgment, might have sold on execution the interest of the mortgagor in the goods and chattels mortgaged (How. Stat. § 7682); and for the purposes of a levy might have taken possession temporarily. *Cary v. Hewitt*, 26 Mich. 228; *Macomber v. Saxton*, 28 Mich. 516; *Nelson v. Ferris*, 30 Mich. 497; *Haynes v. Leppig*, 40 Mich. 602. But the levy must be subordinate to the right of the mortgagee (*Worthington v. Hanna*, 23 Mich. 530); and a sale, if made without first paying off the mortgage, must be made of the goods in gross, subject to the mortgagee's lien. *Worthington v. Hanna*, *supra*; *King v. Hubbell*, 42 Mich. 597; *Haynes v. Leppig*, 40 Mich. 602; *Baldwin v. Talbot*, 46 Mich. 19; *Laing v. Perrott*, 48 Mich. 298. It is not apparent on this record that an execution would not have accomplished the purposes of effectual remedy quite as effectually as the appointment of a receiver; but if for any reason a receiver was deemed necessary, he could not properly be given greater powers than a sheriff would have had if execution had been placed in his hands. It would have been proper to empower him to examine the property and inventory it, for the purposes of an intelligent sale; but a sale must be made by him of the property in gross subject to the mortgage, and all his proceedings must be at the expense, not of the mortgagees, but of the fund that might be realized on the sale.

The order complained of should therefore be modified so far as it authorizes the receiver to displace the possession of the mortgagees, and so far as it authorizes the receiver to sell the mortgaged property without regard to the mortgage lien, and to pay the mortgagees from the proceeds after deducting [*564] expenses. The statute only contemplates a sale when a greater sum than the amount of the lien can be realized; and this is inconsistent with a sale in parcels, the outcome of which cannot be known when it is begun. And it is unjust, even if the statute would permit it, that the mortgagees should be subjected to the risks of a sale of all the property to be made by a receiver at the expense of the fund, in a suit which concerns only other parties, when under their security they have a right to make sale themselves.

The order complained of does not require the receiver to give

security. Probably this was an inadvertence. It should be corrected.

An order will be entered in accordance with these views.

MOORE v. GILMORE.

16 Washington 123, 47 Pac. 239. (1896)

Garnishment of Persons Indebted to Defendant and Others—Power to Split the Demand—Bringing in Claimants, Necessity of, Whose Right or Duty.

Garnishment. From judgment discharging the garnishees plaintiffs appeal. Affirmed.

Boyer & Guie, and *Greene, Turner & Lewis*, for appellants.

Ira Bronson, for respondents.

The Court by Scott, J. The plaintiffs brought suit upon a promissory note and obtained judgment against the defendant Gilmore. While the action was pending, and a few days prior to the rendition of the judgment, they caused a writ of garnishment to be issued and served on the other parties respondent. The garnishees appeared and answered, but did not disclose any liability to the principal defendant. Plaintiffs controverted the answers, and, a jury being waived, the issue came on for trial before the court. The facts showed that some of the garnishees were indebted to Gilmore and one Kirkman as joint claimants; that Kirkman was dead; [*124] that after his death Gilmore and Kirkman's executors brought suit on said claim against said garnishees and obtained judgment; that thereafter the plaintiffs brought suit on a bond given, in said action last hereinbefore mentioned, to the plaintiffs, by all of the garnishees, and obtained a judgment against all of them; and that none of the judgments had been paid. On these facts the court discharged the garnishees, and the plaintiffs have appealed.

The question is presented whether, upon a claim against one party, garnishees can be held upon a debt owed such party and another person jointly. The authorities are in conflict upon this point. A number of cases have been cited by the appellants, holding that a joint claim may be reached for the individual debt of one of the joint claimants, and some of the text-books are to that

effect. *Whitney v. Munroe*, 19 Me. 42, 36 Am. Dec. 732; *Thorndike v. De Wolf*, 23 Mass. (6 Pick.) 120; *Miller v. Richardson*, 1 Mo. 310; *Fogleman v. Shively*, 4 Ind. App. 197, 30 N. E. 909; *Perry v. Blatch*, 2 Kan. App. 522, 43 Pac. 989; Drake, Attachments, §§ 566 to 572; 8 Am. & Eng. Ency. Law, p. 1169.

There are other cases and text-books, cited by the respondents, holding to the contrary, and a number of cases have been cited by both parties relating to the garnishment of debts due a partnership on a claim against one of the partners. A distinction is drawn in the authorities between debts due joint claimants and those due to a partnership, and in some states where it is held that joint claims may be reached upon a debt against one joint claimant, it is held that the interest of a single partner in a partnership claim cannot be so reached. The reasons for this usually given are that a partner has no separable interest in any specific partnership property, and that such property [*125] is first liable for partnership debts, and to such claims as may be due the other partners owing by the partner proceeded against, and that the effect of this is to so involve the proceedings as to render the remedy impracticable of enforcement. If there were no such debts, however, it would seem that this reason ought not to prevail, but with that question we have not to deal in this case.

We shall not undertake to review the authorities cited in detail, but we have examined them and are of the opinion that the better sustained rule is that a joint claim may be reached by garnishment to the extent of one of the claimant's interests therein to satisfy his individual debt. The reasons given in those cases holding that a joint debt may not be so reached are not always satisfactory or tenable. A very general one given is that the garnishing creditor can have no greater rights or privileges than the principal defendant or primary creditor of the garnishee. Another one is that the demand cannot be severed and thus subject the garnishee to the liability of several suits. Also, that the other joint claimant is an interested party and entitled to half the moneys collected.

Aside from the question that the garnishing creditor may always inquire into fraudulent transactions between the principal

defendant and the garnishee for the purpose of placing such defendant's property beyond the reach of his creditors, the law is well settled that a single claim against one party may be severed to the extent of taking only sufficient of it to satisfy the demands of the garnishing creditor. The fact that the garnishee may be authorized to pay the whole demand to the officer, or to turn over the whole property to him, as the case may be, can have no bearing on this, for it might not always be allowable, at his option, [*126] as in a case where he should be under two garnishments from different courts, to recover different claims against the principal defendant. If the law will thus sever a single demand owing by the garnishee to the principal defendant solely, it would seem that the only reason for holding that the garnishee cannot be held to answer for the debt of one, where he owes two or more jointly, would be in consequence of a failure in the law to provide for the protection of the interests of the other joint claimants and the garnishee as against them; and, if such protection is given, the difficulty is obviated.

As the right of garnishment is a statutory one, it is probable that the conflict in the authorities is due in a measure to a difference in the statutory provisions of the several states upon the subject of garnishment. The tendency of legislation, in this state at least, has been to extend rather than curtail the right. The general purpose of the law is to subject all property of the debtor, over and above his exemptions, to the payment of his debts. Where the right of garnishment is given it would seem that the question as to whether it would be available in a particular case would be dependent upon two matters: these are, that the remedy should be capable of enforcement, and a due protection given to the rights of third parties who thus become unwillingly involved in such controversies between a creditor and his debtor. It may be said that the law must award such parties, who may well be styled "innocent parties," ample protection, where they are called upon to respond to some other person than their own contract creditor, as in the case of garnishment. Such questions, of course, must be largely determined by the statutes of the particular state upon the subject of garnishment, and the question arises, [*127]

what are the statutory provisions of this state relating to these matters? * * * It will be seen that the remedy here is a favored, broad and comprehensive one, and § 322 of the code requires that it shall be liberally construed in furtherance of its objects.

There can be no question as to the practicability of the remedy as applied to the facts of this case, and it would seem, therefore, that the only question is, does the law afford sufficient protection to the rights of these garnishees and the other joint claimants? If so, a reasonable construction to effect its evident purposes, would require us to hold that a joint debt may be reached to satisfy a demand against one of the joint claimants. But we are of the opinion that the other joint claimants must be held to be interested parties in a proceeding like this, as the relations between the [*128] joint claimants and the garnishee will be so materially changed by virtue of the proceeding. It is clear that the garnishing creditor can only enforce collection of the interest of his debtor in the joint claim, and then only to the extent of satisfying his own claim, and a balance might be left due such debtor from the joint debtor, though less, to the amount of that recovered, than that due to the other joint claimant. It is evident that such a change in the relations of the parties should not be made without giving the other joint creditor an opportunity to participate in the proceedings and insist upon the payment of the whole claim, and upon his right at that time to his share of the moneys collected. We have no doubt that the joint claimants and their debtor might make any agreement between themselves that was satisfactory to them, as relating to the payment of the balance of the claim after the demands of the garnishing creditor are satisfied; but, for the protection of all parties, the other joint claimants should be brought in, or at least given an opportunity to come into the proceeding to protect their rights, and also to the end that they should be thereby concluded as against the garnishee to the extent of the amount recovered of him.

From the decisions, it looks as though in some instances unnecessary hardships are placed upon a garnishee in such a proceeding, where he has no direct interest as between the parties, in requiring him to act at his peril to see that the garnishment

proceeding is properly instituted and a valid judgment rendered against him, or that otherwise a payment thereunder would be no protection to him in an action by the debtor in the principal action. This could be obviated in all cases by making such principal defendant a party to the garnishment proceedings, where he is [*129] not one, so that the whole matter could be determined and the rights of all parties concluded and the garnishee thus effectually protected.

Section 150, Code Proc., provides that the court may determine any controversy between parties before it when it can be done without prejudice to the rights of others, or by saving their rights. But when a complete determination cannot be had without the presence of other parties, the court shall cause them to be brought in. This statute not only gave the right or power to bring in the other joint claimants in this instance, but, in our opinion, it should be held as making it obligatory, as such seems to be the intent of the provision. It is true that, in *Marx v. Parker*, 9 Wash. 473, 43 Am. St. 849, 37 Pac. 675, we said that the court could not, upon its own motion, require a third party to intervene in a garnishment proceeding; but this would not prevent the court from requiring a third party to appear upon the application of either of the parties in court. While the method of bringing such third party into court is not clearly pointed out, it seems to us to be clearly authorized in some manner by this section, and also by § 49, which provides that where jurisdiction is given, all means to carry the proceeding into effect are also given; and if the course of proceeding is not specifically pointed out by statute, any suitable process or proceedings may be adopted which may appear most conformable to the spirit of the code. This statute was clearly intended for a purpose, and that purpose is apparent. It would apply to a case of this kind, in the absence of any special provision, and it must be held in force, it seems to us, and to cover such a case as this; or it must be held that its provisions are so general as to be [*130] wholly inoperative, and we can see no reason for so holding and thus depriving it of any effect. Provision is also made whereby the other joint claimant could intervene upon his own motion, or, in case there was a dispute as to the fund, pro-

vision is made for the payment of the same into court by the garnishee. Code Proc., §§ 152 to 156.

Now, while either of the parties could have applied to the court to have the other joint claimants brought into the proceedings, it seems to us that the obligation rested upon the plaintiffs, as they were the moving parties. They might have done this in the first instance, if they knew the facts, by applying to the court for an order and having suitable process or notice served upon the other joint claimants requiring them to appear in the proceeding and ask for such relief as they were entitled to; or, in consequence of a failure to do so, to be concluded by the judgment thereafter rendered; or they might have done so afterwards, when the nature of the indebtedness was disclosed. While the defendants in the garnishment proceeding had this privilege, it was not incumbent on them to exercise it, and as the plaintiffs did not ask to have the matter put in shape so the court could protect the interests of all parties, there was no error in dismissing the proceedings, and for that reason

The judgment is affirmed.

FOSTER v. SINGER.

69 Wisconsin 392, 34 N. W. 395. (1887)

Garnishment of Wages—Contingent Liability—The Test—Debts to Become Due.

Garnishment. Garnishee discharged. Plaintiffs appeal. Affirmed.

Chas. M. Bice, for appellant.

Adolf Herdegen, for respondent.

The Court by Taylor, J. *Foster* and others commenced an action in justice's court against *M. Phillips*, on the 27th day of August, 1885. A garnishee summons was served in said action upon the respondent *Singer* on the 28th of August, 1885. The action between the appellants and the garnishee was tried in the justice court, and judgment rendered [*393] against the garnishee for \$47. From this judgment the garnishee took an appeal to the county court, and on the trial there the court ordered the plaintiff nonsuited, and the garnishee discharged, with costs. From the judgment entered in favor of the garnishee for costs the plaintiffs appeal to this court.

The evidence on the trial in the court below showed that the garnishee employed Phillips, the defendant in the main action, as a traveling salesman at a salary of \$125 per month, to be paid at the end of each month. The appellant introduced in evidence on the trial in the county court an account taken from the books of the garnishee, showing, among other payments to the said Phillips, that he had paid him on the 31st day of August the sum of \$125. This account also shows that Phillips was credited with his salary, \$125, on the last day of each month, and that payments were made on the last day of each month for the salary of each month, except that in the month of July there were credits of \$5, on the 6th; \$2 on the 26th; \$5 on the 27th, and \$113 on the 31st of July. The evidence of the plaintiffs also showed that the garnishee *Singer* testified in the justice's court that Phillips was employed by him as a salesman at a salary of \$125 per month, due at the end of each month.

The learned county judge nonsuited the plaintiff because it appeared from all the evidence in the case that there was nothing due or owing by the garnishee to Phillips on the day the garnishee summons was served on him, viz., on the 28th of August, 1885. We think the nonsuit was properly granted. The statute fixes the liability of the garnishee upon the *status* of his relation to the principal defendant at the time the garnishee process is served. See sec. 3719, R. S. 1878. The test of the liability of the garnishee to the creditor of the defendant is generally this: Could the defendant have maintained an action against the garnishee at [*394] the time the garnishee process was served to recover the debt or liability sought to be garnished? It seems to us evident that under the testimony given in this case, had Phillips brought his action for his salary for August, 1885, on the day the garnishee summons was served, viz., 28th of August, his action would have been prematurely brought, and he must have failed in his action. There certainly was nothing due to Phillips on the 28th of August, 1885. See *St. Louis v. Regenfuss*, 28 Wis., 144, 147; *Allen v. Megguire*, 15 Mass. 490; *Hadley v. Peabody*, 79 Mass. (13 Gray) 200.

But it is urged that the statute extends the liability of the garnishee to cases in which he would not be liable to an action by his

creditor. This claim is well founded. The statute provides that the garnishee shall stand liable to the plaintiff to the amount of the personal property, money, credits, and effects in his hands belonging to the defendant, and the amount of his own indebtedness to the defendant then due, or to become due, and not by law exempt from sale on execution. See sec. 3719, R. S. And the provision for judgment against the garnishee contains a similar provision. See sec. 3725, R. S.

The only question in the case, therefore, is whether there was anything "*to become due*" from the garnishee to Phillips, on the 28th of August, when he was served with the garnishee summons, within the meaning of the statute above quoted? We think this question has been answered by this court against the claim of the appellant. In *Bishop v. Young*, 17 Wis. 47, 53, the present chief justice, in speaking of the construction to be given to the language of the statute above quoted, says: "And the 'debts due or to become due,' evidently relates to such as the garnishee owes absolutely, though payable in the future. We have no idea the statute intended to include in the language 'to become due' a debt which might possibly become due upon a performance of a contract by the defendant in attachment. [*395] * * * There was nothing absolutely due him at the time of service of garnishee process upon the respondent. And whether anything would become due, depended upon a contingency." See also, *Smith v. Davis*, 1 Wis. 447; *Huntley v. Stone*, 4 Wis. 91. Under the evidence in the case at bar there was nothing due absolutely from the garnishee to Phillips, when he was served with the garnishee summons. The evidence clearly shows a hiring by the month for a salary to be paid at the end of the month, and according to the decisions of this court the contract is an entirety. Phillips could not recover any part of his wages unless he worked the whole month. If Phillips had quit work on the 29th, he could not have recovered any part of his wages for the month. The debt, therefore, would only become due upon the contingency that Phillips continued to work for the garnishee for the entire month. See *Gordon v. Brewster*, 7 Wis. 355; *Lee v. Merrick*, 8 Wis. 229; *Jennings v. Lyons*, 39 Wis. 553; *Diefenback v. Stark*, 56 Wis. 462; *Koplitz v. Powell*, 56 Wis. 671.

It can make no difference as to his liability whether the summons was served on the 28th day of the month or on the second. In either case whether anything would become due depended upon Phillips working the entire month; and if the garnishee is liable when served on the 28th, he would be equally liable if he had been served on the 2nd, if it appeared on the trial that Phillips had worked the entire month. See, also, upon this subject, *Hancock v. Colyer*, 99 Mass. 187; *Knight v. Bowley*, 117 Mass. 551; *Wood v. Partridge*, 11 Mass. 488; *Wyman v. Hichborn*, 60 Mass. (6 Cush.) 264. There is nothing in the case of *Jones v. St. Onge*, 67 Wis. 520, which in any way changes the rule laid down in the cases above cited in this court.

The judgment of the county court is affirmed.

WEBBER v. BOLTE.

51 Michigan 113, 16 N. W. 257. (1883)

**Garnishment of Builder in Suit Against Contractor—Contingent Debts,
Under Statute Making Garnishee Liable for—Lapse of
Proceedings by Delay—Amendment.**

Garnishment. Plaintiff brings error. Reversed.

A. A. Ellis, for appellants.

Mitchell, Bell & McGarry, for appellees.

The Court by Cooley, J. Two of the questions which were argued in [*144] this case seem to us to require no discussion, and we simply announce our conclusions.

1. The court should not have dismissed the case against the garnishees. The ground of the dismissal was delay in the proceedings. The case was begun September 16, 1881, and was being tried in December, 1882, when the trial judge on his own motion dismissed it, relying upon *Blake v. Hubbard* 45 Mich. 1, for his authority. The defense raised no question of laches, and it is shown that jury trial had been demanded, and it could not have been tried at the preceding August term because no jury was summoned for that term.

2. The plaintiffs should have been allowed to amend the proceedings against the principal defendant so as to show his name in full. He had been sued upon promissory notes in the name by which he signed them, J. V. Consaul. The plaintiffs proposed to

amend by substituting Jacob for J. No question of identity was made, and the amendment should have been permitted at any time when it was found important.

3. Upon the main question we think both parties have been laboring under some misapprehension. Consaul had contracted with defendants for the erection of a church building which was to be completed November 1, 1881. The contract price was \$8563. Payments were to be made as the work progressed, to the amount of ninety per cent. of the estimates, and the balance after completion. A forfeiture was agreed upon in the event that the work was not done by the time stipulated. When the suit in garnishment was begun defendants had made large payments, and they insist that nothing was then due from them to Consaul. Plaintiffs dispute this, but they claim that whether that was so or not, they had a right to hold the defendants for anything that might subsequently become owing to Consaul for work done by him under the contract. This claim is made under an amendment to the garnishment statute, which provides that the garnishee shall "be liable on any contingent right or claim against him in favor of the principal defendant." [*115] Public Acts 1879, p. 270. Consaul's right, it is said, was contingent on his performing his contract; so that the case is within the very words of the statute.

The case may seem to be within the words of the statute, but it is not within its intent or reason. To permit garnishment upon such claims would be a most unwarrantable interference with the contracts of third parties, and must in many cases deprive them of substantial rights. It would be especially mischievous in the case of building contracts; for in a very large proportion of all cases of such contracts, the means for their fulfillment must be obtained from payments on the estimates; and if these can be garnished in advance, performance would be rendered impossible. This would be a great hardship to the debtor, but it would be quite as much so to his employer, who might have his arrangements broken up and serious injury inflicted without on his part any fault whatever.

No doubt the employer has a claim in such a case that the builder shall perform his contract; but the contingency on which money is to be payable is one depending on the subsequent earning

of money. It is therefore a contingency depending on the will and ability of the debtor to earn money; a will which it may generally be assumed will not be exerted where earning is not to be followed by enjoyment. If there is a contingent claim here, so there is when a laborer hires out for a year to be paid at the end of the year; and his creditor may garnish the claim as soon as the hiring takes place. It would be a safe assumption that very little labor would be done under the hiring after the claim was garnished.

Whatever, if anything, was due at the time the process was served in this case, the plaintiffs are entitled to reach. The ten per cent. kept back as security for final performance might perhaps be considered a sum already contingently earned; but no question upon that can arise in this case, as it was conceded that Consaul did not complete his contract. The question of fact, then, is narrowed to this: whether the ninety per cent. to which Consaul was entitled [*116] on the estimates, exceeded at the time this case was begun the amount which had been paid to him up to that time. Upon that question the parties are entitled to produce their evidence.

The judgment must be reversed with costs and a new trial ordered.

LEHMANN v. FARWELL.

95 Wisconsin 185, 70 N. W. 170, 37 Lawyer's Rep. An. 333. (1897)

Garnishment of Tortfeasor—Effect of Verdict in Action for the Tort—When Tortfeasor Chargeable.

Garnishment by Henrietta Lehmann against the Milwaukee Street Ry. Co. as debtor of Hubert Deuster, principal defendant. John Farwell & Co., Sweet, Dempster & Co., and defendant's wife, Caroline A. Deuster, intervene in the garnishment suit as claimants of the fund paid into court by the garnishee. From a judgment giving Caroline A. Deuster \$622, and Farwell & Co. the remainder, H. Lehmann, C. A. Deuster and Farwell & Co. appeal. Affirmed.

The liability of the garnishee was for a negligent injury to the person of the principal defendant, and at the time plaintiff's garnishment was served, Deuster has sued and verdict had been re-

turned in his favor against the M. S. Ry. Co. for \$1,500 for said injury, but no judgment had yet been entered thereon. Judgment had been entered when Farwell & Co.'s garnishment was served. Sweet, Dempster & Co.'s garnishment was served still later. Deuster's wife claimed by assignment.

Sylvester, Scheiber, Riley & Orth, for plaintiff.

Julius Roehr, for Caroline A. Deuster.

Haring & Frost, for Farwell & Co.

The Court by Winslow, J. * * * The second question is whether a mere verdict in a purely tort action creates a liability which can be garnished. The garnishee is not liable unless at the time of the service of process his liability to the principal defendant is absolute. R. S. sec. 2768; *Vollmer v. C. & N. W. R. Co.* 86 Wis. 305. The question of liability or not is fixed at the time of the service of process, and it must then be absolute, though perhaps payable subsequently. If, however, the liability is contingent on a future, uncertain event, it is not subject to garnishment. *Edwards v. Roepke*, 74 Wis. 571; *Dowling v. Lancashire Ins. Co.* 89 Wis. 96. A mere claim for personal injuries is not the subject of garnishment. *St. Joseph Mfg. Co. v. Miller*, 69 Wis. 389. The verdict does not turn it into a debt, nor into an absolute liability. That must be done, if at all, by the judgment. No matter how long a verdict remained on the records of the court, no action could ever be maintained upon it. *Thayer v. Southwick*, 74 Mass. (8 Gray), [*191] 229; Rood, Garnishment, § 152. The case of *Jones v. St. Onge*, 67 Wis. 520, is claimed to support the contrary doctrine. While there may be language in the opinion in that case which would tend to support the theory that a mere verdict in a tort action is subject to garnishment, the case itself was evidently rightly decided upon another ground. In that case the garnishee had been sued in replevin for certain logs by the main defendant, and the verdict rendered was that St. Onge, the main defendant, was the owner of the logs, and that the garnishee unlawfully withheld possession of them, and fixed their value. After verdict and before judgment, the garnishment papers were served. It was plainly a proper case for garnishment, because the garnishee had property of the main defendant in his hands, or was indebted

to him therefor, at the time process was issued. In fact, the verdict neither helped nor hindered the liability of the garnishee. He would have been liable had no suit been pending at all, because he had property of the main defendant in his hands at the time the garnishee process was served, or was indebted to the main defendant to the amount of the value of such property. So far as the *St. Onge Case* seems to justify the doctrine that a mere verdict in an action to recover damages for personal injuries is the subject of garnishment, we cannot follow it. It follows that the plaintiff's garnishment must fail, because she garnished after verdict and before judgment, and the Farwell & Co. process becomes the first lien upon the moneys in court after the claim of Mrs. Deuster is paid. These were the conclusions reached by the court below.

Judgment affirmed.

JONES'S ADM'R v. CREWS.

64 Alabama 368. (1879)

Garnishment—Demands Payable in Kind—Test of Garnishee's Liability as Debtor.

Garnishment by James H. Perdue, as administrator of Joseph A. Jones, upon a decree in chancery in favor of said J. A. Jones, deceased, against Sarah J. Jones, the garnishment process being against C. Madison Crews. From a decree discharging the garnishee complainant appeals. Affirmed.

The Court by Stone, J. * * * Garnishment is a proceeding of purely statutory creation, unknown to the common law; and while we are inclined to construe it favorably, as highly remedial and beneficial, we have no power to originate machinery, or process, by which to adapt it to conditions, which its statutory provisions are not broad enough to cover. The court having power only to render an unconditional money judgment against the garnishee, or to condemn personal chattels in his hands, it early became a question, what description of debt or liability would [*372] authorize a personal money judgment against the garnishee. It was settled, that only such debts as would maintain debt, or *indebitatus assumpsit*, if sued on by the defendant, could be the subject of such condemnation and personal judgment. * * * [*373] * * *

In the present case, the garnishee was summoned, and filed

his answer in October, 1878. He admitted he had executed to the defendant, Jones, his two promises in writing, one for the payment of four bales of cotton, of certain class and weight, October 15th, 1879, and the other for the payment of six bales, October 15th, 1880. At the October term of the [*374] court, 1878, the chancellor discharged the garnishee on his answer. It will be observed that, under this contract, Crews, the garnishee, made no promise to pay money. Neither was it a promise to pay a sum of money, which might be discharged by the delivery of cotton. It was a simple promise to deliver and pay cotton. When the garnishment was sued out and served, and when the answer of the garnishee was filed, it could not be known that the liability from Crews to Jones would ever become a money debt. We cannot indulge the presumption that Crews would violate his contract, and fail to deliver the cotton. The court had no power to change the obligation to deliver cotton, into a promise to pay money. * * *

The decree of the chancellor is affirmed.

Some statutes are so broad that the garnishee may be charged for demands not payable in money, but the judgment can be only that he pay to the sheriff having the writ against him what he had contracted to furnish the defendant and at the same time and place named in the contract. *Stadler v. Parmlee*, 14 Iowa 175. See also *Drake*, Attach. § 550; *Rood*, Garnish. §§ 115-117.

THOMPSON v. GAINESVILLE NATIONAL BANK.

66 Texas 156, 18 S. W. 350. (1886)

Garnishment—Garnishee's Liability on Debts Evidenced by Commercial Paper—Effect of Renewal or Maturity in Hands of Defendant After Garnishment.

Garnishment. Garnishee appeals. Affirmed.

Potter & Smith, for appellant.

Stuart & Bailey, for appellee.

The Court by Willie, C.J. The Gainesville National Bank obtained a judgment against A. J. Addington, and on June 20, 1885, had a writ of garnishment sued out thereon, and served upon the appellant, Thompson. On November 2, 1885, Thompson filed his answer denying any indebtedness to Addington, or having any effects of his in possession, either at the date of serving the writ or of making the answer. This answer was controverted by the

bank on the ground that on July 12, 1884, Thompson executed a note to Addington, payable twelve months after date, and that this note at the time the writ was served was held as collateral by one Smith to secure a debt due to Smith from Addington. The terms of the note as stated in the contesting affidavit showed that it matured previous to the filing of the answer, though it was not due when the writ of garnishment was served.

The proof before the judge who tried the cause, without a jury, was conflicting in some important respects bearing upon the liability of the note to the garnishment proceeding. The judge subjected the note to the garnishment. In passing upon his judgment we must, in case of conflict of evidence, treat as true the testimony to which he must have given credence in making up his conclusions. The case before us, therefore, is that of a garnishee indebted to the judgment defendant upon a negotiable note, not due when the writ was served, but maturing before answer filed, and paid before that time, but after maturity, to the judgment defendant, he being at the time still owner of the note.

The law is well settled that the maker of an overdue note can be garnished for a debt due the owner. The note cannot be assigned to an innocent holder, free from such defences as the maker could set up in a suit against him by the assignee. Garnishment at suit of the assignor's creditor would be a good defence, and hence the maker is fully protected when compelled by judgment to pay the amount of the note to the plaintiff in garnishment. It seems settled, too, by the weight of authority that if the note is due and owned by the payee at the time judgment in garnishment is rendered, the maker is liable to such judgment, though, at the time he was served, the note had not matured. *Drake on Attach.*, §§ 587, 588.

The authorities recognize the right to charge the maker after the note matures, provided, that at the date of serving the writ, the note [*158] was the property of the payee. *Bassett v. Garthwaite*, 22 Tex., 230, and other cases cited in note to § 623, Sayles' Treatise.

This is, in effect, to require the maker to answer as to his indebtedness upon a note not due, so that the plaintiff may charge

him in garnishment by showing that it belonged to the defendant when service was made, and had since matured, and was still the property of the defendant. The law exempts the maker from a judgment in garnishment whilst the note is current, because he would not otherwise be protected by the judgment from his liability to the holder. But, if he is fully protected by the judgment, there is no reason why one should not be rendered against him, though the note was not due when the writ was served.

Protection being secured to the maker, the reason of the law for not subjecting him to garnishment has ceased, and the plaintiff should be entitled to the benefit of his indebtedness to the defendant. He may not be able to secure this benefit without proceeding before the note became due. It is this that lays the foundation for a judgment after the maturity of the note, and to obtain this judgment he must be allowed to have an answer as to the condition of the indebtedness at the date of the service, to prove, if he can, that it was a debt upon a note, though negotiable and current, and that, at the time of service, the note belonged to the defendant.

This does not interfere with the maker's rights in the least, for, if the note thereafter and before maturity, has been assigned, the judgment cannot be rendered. The burden of proof is on the plaintiff to show that the payee has not transferred the note before maturity, otherwise the garnishee must be discharged. As to what effect a transfer after maturity would have, we need not now determine.

But the protection afforded the maker of the note is against a transfer by the payee to other parties. It is only in this event that he can be endangered by a judgment in garnishment. No other disposition of the instrument before judgment subjects him to a suit by any other person than the payee, and to a suit by him the judgment in garnishment is a full defence. Against the maker's own collusion with the payee to defeat the plaintiff's right to the judgment, the law does not protect him.

If, as in this case, whilst the note is still owned by the payee, and overdue, and not liable to pass to an innocent holder, the maker settles it with the payee, there is no reason why he should be protected against a judgment in the garnishment proceedings. He

has voluntarily paid a debt due from him to the defendant, which the latter could not have recovered. [*159]

After a judgment against the garnishee in favor of the plaintiff in garnishment, with full notice that the plaintiff had laid the foundation for such a judgment, he has paid the note, not for his own protection, but to enable the defendant to avoid the payment of a debt, which the plaintiff was entitled to enforce against him, and which he might have enforced, but for this collusion between the defendant and the garnishee.

It being perfectly apparent that none of the reasons why the maker of negotiable paper, current at the date of serving the writ of garnishment, should be exempt from the proceedings are applicable to the present case, and that neither the maker nor any innocent holder of the paper are in the least prejudiced by the garnishment, we are of opinion that the case presented was a proper one for a judgment against the garnishee.

The same conclusions have been reached in the courts of one other state, and we are pointed to no decisions to the contrary. *Leslie v. Merrill*, 58 Ala. 322. Whether the same rule would hold if the note had been paid before maturity we are not called upon to decide in the present appeal.

We are of opinion that the judgment below is correct, and it is affirmed.

Affirmed.

MOORE v. DAVIS.

57 Michigan 251, 23 N. W. 800. (1885)

**Garnishment—Effect of Orders, Checks, Etc., as Assignments of Fund—
Rule and Exceptions.**

Garnishment by Edward C. Moore against Alex. R. and Wm. F. Linn as debtors of the principal defendant, John C. Davis. The First National Bank of Madison, Indiana, intervened as claimant. From a judgment for plaintiff, claimant brings error. Reversed.

The case was tried below before the court without a jury; and the court found as facts, that the garnishees confessed liability in the sum of \$139.65 for goods purchased, and that before the garnishment was served the claimant in the regular course of its business, had received from Davis a draft for the amount with a copy

of the account annexed and paid him for same less the regular discount.

Wm. J. Gray, for appellant.

Geo. W. Bates, for appellee.

The Court by Cooley, C.J. * * *The controversy, it will be seen, turns upon the question [*255] whether the draft by Davis on the Linns operated as an assignment of the demand. It was received and discounted by the claimant before the garnishment summons was served, and the Linns were notified of the facts before they answered. If, therefore, the draft transferred the demand to the bank, the judgment is erroneous.

In the recent case of *Grammel v. Carmer*, 55 Mich. 201, the question whether a draft was an assignment of the fund in the drawee's hands, to the extent of the sum drawn for, was considered and decided in the negative. That, however, was the case of a banker's draft, and it was not drawn for the whole fund in the drawee's hands. Many cases were cited in the opinion filed in that case, and the following, not then cited, are to the same effect: *Shand v. Du Buisson*, L. R. 18 Eq. 283; *Lewis v. Traders' Bank*, 30 Minn. 134; *Jones v. Pacific Wood &c. Co.*, 13 Nev. 359; *Rosenthal v. Mastin Bank*, 17 Blatchi. 318, Fed. Cas. No. 12063; *Dolsen v. Brown*, 13 La. Ann. 551; *Sands v. Matthews*, 27 Ala. 399.

But this case differs from *Grammel v. Carmer* in the fact that the draft now in question was drawn for the exact amount of a sum claimed to be due from the drawees to the drawer for a bill of merchandise, and that the account was attached to the draft, evidently for the purpose of being sent forward with it. When thus sent forward, it would explain to the drawees the account on which it was drawn; but it must also have been understood to serve a further purpose, namely, to be evidence in the hands of the drawees that the account was paid when the draft was taken up by them. There could be no sufficient reason for attaching it at all, unless it was understood that payment of the draft would be payment of the account as well.

By the general commercial law, as was said in *Grammel v. Carmer*, the purchaser of a draft is supposed to take it in reliance

upon the responsibility of the drawer, and he has no other reliance until it is accepted. This is the general rule. But if the draft is for the whole amount of a fund, the draft may, in connection with other circumstances, tend to show an intent that it should operate as an assignment. *First* [*256] *Nat. Bank of Canton v. D. S. W. Ry. Co.*, 52 Iowa, 378. And whereas, in this case, the draft is for the amount of an account, and the account is attached, the purpose to assign appears on the papers themselves, and they need no support from collateral circumstances. The payee, then, in taking the draft has a right to understand that, in addition to the responsibility of the drawer, he has such security for payment as may be supplied by the account, and that he may collect the account for the satisfaction of the draft. The drawer, by the papers, in effect, says to the drawee: "This is my bill against you, which I have sold to the payee by this draft, and you are requested to make payment of it to him." This is what a business man would have a right to understand from them. The draft with the bill thus attached is not an ordinary bill of exchange, but it is an order that the debtor shall pay the amount of his debt to the person to whom it is delivered. The fact that the draft is negotiable in form is of no importance. It does not at all tend to rebut the evidence of intent on the part of the creditor to assign the demand.

The judgment must be reversed.

REYNOLDS v. HAINES.

83 Iowa 342, 49 N. W. 851, 32 Am. St. 311, 13 L. R. A. 719. (1891)

Garnishment—Proceeds of Exempt Property, Liability to Process—Cause of Change, Importance.

Garnishment by Reynolds & Churchill seeking to charge the Capital Ins. Co. as garnishee of G. W. Haines, principal defendant. From judgment discharging the garnishee plaintiffs appeal. Affirmed.

G. H. Phillips and Ainsworth & Hobson, for appellants.

H. W. Clements, for appellee.

The Court by Beck, C.J. I. The plaintiffs caused process of garnishment to be issued against the Capital Insurance Company upon a judgment against the defendant, [*343] claiming that the

insurance company is a debtor of the defendant upon a policy issued to him upon which there had been a loss of the property insured. A motion to dismiss the proceeding was sustained upon the grounds, which were not disputed, that the property insured was exempt from execution, being books, instruments, etc., used by the defendant, who was a physician and surgeon, in the practice of his profession.

II. The question presented for decision by the record is this: Are the avails of insurance upon personal property which is exempt under the statute from debts of the assured also exempt? The statute, Code, § 3072, declares that, "If the debtor is a resident of this state, and is the head of a family, he may hold exempt from execution" certain personal property, which includes the books, instruments, etc., of a physician, the property covered by the policy of insurance in this case. There is no provision as to the exemption or liability of the proceeds or avails of such property when disposed of by sale or otherwise.

III. The purpose of the statute is to secure to the debtor who is the head of the family—a physician and surgeon in this case—the instruments, books, and other articles which enable him to practice his profession. Its purpose is to secure the necessities of life—food, raiment and shelter—to families who are dependent upon the heads thereof, by securing to them the instruments and means by the use of which they are enabled to support their families. The exemption is plainly for the benefit of the families of debtors, for those having no family can claim no exemption. The statute must be liberally construed, to carry out its purpose and spirit. *Bevan v. Hayden*, 13 Iowa, 122; *Davis v. Humphrey*, 22 Iowa, 138; *Kaiser v. Seaton*, 62 Iowa, 463. The debtor in the case before us was authorized, under the statute, to hold the property in question exempt from debts, if it were used for the purpose of his profession. [*344] It is plain that the use for which the property was kept determined the question of its exemption. The books, instruments, etc., of the physician and surgeon may be kept subject to the authority to change them, by sale or otherwise, in order to procure those of better character or improved construction. It is plain that the physician may sell his

books, and replace them by better ones. Such sale is a proper use of his books and instruments in his profession. Another proper use of his books and instruments is their preservation from injury and destruction. He may insure them, to protect himself and family from loss from fire. The fact that they were insured would not make them subject to his debts. If they are destroyed by fire, the indemnity secured by insurance stands in the place of the books. It is intended to preserve the physician's library by securing means for its restoration after it is lost by fire. Surely that indemnity which is the indebtedness of the insurance company, or the money paid by it, stands in the place of the library, and ought to be, as it is, exempt from execution. The money due on the policy stands in the place of the property destroyed, and this must be true whether the money takes the place of the property by contract, or is acquired *in invitum* by proceedings against the owner.

It is plain that a trespasser, by appropriating the property and converting it to his own use, cannot make it subject to the payment of the owner's debts by holding the value of the property the measure of the debtor's damages for the trespass, subject to garnishment by the creditors. If he could do this, it would be a convenient method to defeat the exemptions of the statute. As we before remarked, the object of the statute is to secure to the family the benefit of certain property. These benefits cannot be enjoyed unless the debtor have the unrestricted use and control of the property free from liability for debts as long as it is owned [*345] and used by him. When it is used for other purposes than the support of the family, it becomes liable for debts. But the change of the property into money will not indicate an immediate abandonment of the claim of exemption to the money on the ground of a purpose to invest it in like or other exempt property. Until an opportunity exists to make such investment, which is not a change of articles of exempt property, the debtor ought not to be presumed to abandon his claim. The debtor, as we have seen, has the authority to change the articles of exempt property by sale and purchase, exchange or otherwise. He cannot be presumed to have abandoned his right to this authority until he has had an

opportunity to exercise it. The creditor cannot complain of its exercise. He is defeated of no right thereby. The property is held free of his debt, and he is not prejudiced by the change to other like property. These doctrines and conclusions find support in the following decisions of this court: *Kaiser v. Seaton*, 62 Iowa, 463; *Mudge v. Lanning*, 68 Iowa, 641. See, also, cases cited in *Kaiser v. Seaton*, *supra*, and the following: *Evans v. St. Paul Harvester Works*, 63 Iowa, 204; *Brainard v. Simmons*, 67 Iowa, 646; *Leavitt v. Metcalf*, 2 Vt. 342; *Mulliken v. Winter*, 63 Ky. (2 Duv.) 256; *Tillotson v. Wolcott*, 48 N. Y. 188.

Counsel for the plaintiffs cite *Wooster v. Page*, 54 N. H. 125. It is not in harmony with our conclusions. We think that the reasoning upon which it is based is not sound. Other cases cited by the same counsel are not in conflict with our conclusions. They are to the effect that sales of exempt property, with no purpose to reinvest the avails in other like property, or to exchange the articles of exempted property, or are cases involving the exemption of pension money, and some other cases involving like questions, none of which are in conflict with our conclusions in this case.

We reach the conclusion that the judgment of the district court ought to be affirmed.

This decision is believed to be in accord with the decisions in every state except New Hampshire and Mississippi. See *Smith v. Ratcliff*, 66 Miss. 683. For extended review of the decisions see *Rood, Garnish*, §§ 96-99.

HEWITT v. WAGAR LUMBER CO.

38 Michigan 701. (1878)

Garnishment—Burden of Proof—Admissions—Testimony by Officer of Garnishee Corporation.

Garnishment by Hewitt against Wagar Lumber Co. as debtor of Myers, the principal defendant. From judgment discharging the garnishee plaintiff brings error. Affirmed.

Mitchell & Pratt, for appellant.

John Toan and Wells & Moore, for respondent.

The Court by Graves, J. * * * Waiving all questions of jurisdiction and likewise [*705] all objections against the correct-

ness of the plaintiff's earlier proceedings, it is still left to inquire whether the record shows that the plaintiff made out any case on the facts fairly entitled to be submitted to the jury. Because if it does not, the result cannot be disturbed.

It is a general rule and one applicable to this case that where-ever in consequence of the nature of the subject it is a matter of absolute indifference whether a given state of facts does or does not exist, the party who grounds his claim or defense upon its existence must remove that indifference in order to succeed; and meanwhile the opposite party may safely remain passive and insist upon a determination in his own favor if that is not done. And the party upon whom it rests to support the affirmative must maintain it substantially. "It is not enough for him to make out a balanced case and then leave it to a jury to guess at the truth." *Bronson, C. J. in Bogert v. Morse*, 1 Comt., 377. And if the evidence is consistent as much with some other state of facts as that required to sustain the particular proposition, whether express or tacit, it proves neither, and hence is ineffective. *Jackson v. Metropolitan Railway Co.*, L. R. 2 C. P. Div., 125.

The plaintiff charged against the corporation that at the very time when the notice was left with the president on March 30, 1877, it was indebted to Myers, and whether it was so or not depended upon facts which were as likely to be one way as the other, and it was incumbent on the plaintiff to prove that the facts were as the substantiation of his claim required they should be. He recognized what his position involved and attempted to prove his allegation.

The only witness called was the president of the corporation and he swore that Myers had been executing a lumber job in the woods for the corporation amounting to some \$1,600 or \$1,800; that it had not been accepted but witness inferred it had been completed because [*706] Myers had "come out of the woods." Performance of the job was not proved. The witness stated there had been no settlement, but the entries in the corporation books indicated a balance of \$500 or \$600 still unpaid; that he had no knowledge whether the corporation owed anything to Myers except as gathered from the apparent state of accounts in the

books; that prior to the service of the notice, but on the same day, one Alderman informed witness that Myers had assigned to him the demand against the corporation, and that Alderman at the same time exhibited to witness a writing apparently by Myers, and ordering the corporation to pay Alderman or bearer whatever was due Myers for lumbering. * * * Now if we consider the facts together as we must, they do not result in showing, nor fairly conduce to show as against the corporation the matters indispensably necessary to make out and support plaintiff's claim. If the witness had been garnishee and had made similar explanations concerning his own affairs, there would be room for some other considerations. But in order to give to his statements the sense and value they merit as matter of law, his relation to the transaction, to the parties and to the case must be kept in mind. The entire effect of his relation as a showing of fact against the corporation is that Myers was doing a large job for the corporation and that an inspection of the entries in account in the corporation books indicated that \$500 or \$600 of the contract price was still unpaid. As to whether this balance had become as yet an actual debt [*707] at all against the corporation, or if it had, whether it still belonged to Myers, was left indeterminate and without means to decide. As the facts in the record do not import that the plaintiff made a case for the jury, no error he can complain of is shown. My brethren concur in the view here taken. * * *

The judgment must be affirmed with costs.

SCOTT v. ROHMAN.

43 Nebraska 618, 62 N. W. 46. (1895)

Garnishment of Judgment Debtor—In What Court—Aid of Equity—Priority.

Bill in chancery in the Lancaster *district* court by Archie A. Scott against Charles Rohman and others, being all the interested persons, to determine the rights of the respective parties to money paid into said court by John Fitzgerald in satisfaction of the judgment theretofore rendered against him in said court in an action on account wherein John Lanham was plaintiff and said Fitzgerald defendant. From the decree of the court below complainant appeals. Affirmed.

Scott's claim is based on a garnishment in the *county* court of Lancaster against said Fitzgerald on a judgment in favor of said Scott against said Lanham on which an execution had been returned not satisfied. The garnishment was issued out of the county court and served after verdict returned against Fitzgerald in the district court in *Lanham v. Fitzgerald*, but before the judgment was entered. Upon garnishee's answer setting up these facts, and the entry of judgment in *Lanham v. Fitzgerald*, judgment was rendered against him ordering him to pay into said county court the amount of Scott's judgment, which was less than the amount of the judgment in *Lanham v. Fitzgerald*. Instead of doing so, the garnishee paid the whole sum into the district court, and thereupon Scott filed this bill. Rohman claims as assignee of Lanham under an assignment executed after the garnishment was served.

A. G. Greenlee, for appellant.

Webster, Rose & Fisher, *Daniel F. Osgood, Abbott & Abbott*, and *Thomas Ryan*, contra.

The Court by Norval, C.J. * * * The record discloses that the indebtedness of Fitzgerald to Lanham had been reduced to judgment. The first question therefore presented is whether a judgment debtor can be garnished. Section 212 of the Code provides: "An order of attachment binds the property attached from the time of service, and the garnishee shall be liable to the plaintiff in attachment for all property, moneys, and credits in his hands, or due from him to the defendant, from the time he is served with the written notice." * * * [*628] * * * It is very evident that the foregoing provisions are sufficiently broad to cover debts reduced to judgment, and that a judgment debtor is liable to the process of garnishment in a suit against the judgment creditor. The statute is susceptible of no other reasonable construction. It does not exempt any credit of any kind whatever. The decided weight of the decisions in this country lays down the broad doctrine that a judgment debtor may be garnished, and we so hold the law to be in this state. *Osborn v. Cloud*, 23 Ia. 105; *Gamble v. Central R. & B. Co.*, 80 Ga. 595; *Wood v. Lake*, 13 Wis. 84; *Keith v. Harris*, 9 Kan. 387; *Skipper v. Foster*, 29 Ala. 330; 8 Am. & Eng. Ency. Law, 1169; *Drake, Attachment* (7th ed.), § 622.

The question presented by the record to be determined is whether a judgment debtor in the district court of this state is liable to garnishment proceedings issued out of the county court. There is an irreconcilable conflict in the authorities bearing upon the subject. Some decisions are to be found in the books which assert that a judgment debtor in one court may be garnished on process issued out of another court. *Luton v. Hoehn*, 72 Ill. 81; *Allen v. Watt*, 79 Ill. 284; *Jones v. New York & E. R. Co.*, 1 Grant's Cases (Pa.), 457; *Gager v. Watson*, 11 Conn., 168. The majority of the cases, and the more recent decisions, sustain [*629] the doctrine that a debt reduced to a judgment is liable to garnishment when the process of garnishment issues from the same court, but not otherwise. *Drake, Attachment*, § 625; *Waples, Attachment & Garnishment* (1st ed.), 596; *Wallace v. McConnell*, 38 U. S. (13 Pet.) 136; *Thomas v. Wooldridge*, 2 Wood 667, Fed. Cas. No. 13, 918; *Henry v. Gold Park Mining Co.*, 15 Fed. Rep. 649, 5 McCreary (U. S.) 70; *Franklin v. Ward*, 3 Mason (U. S.) 136; *American Bank v. Snow*, 9 R. I. 11; *Burrill v. Letson*, 2 Speers, (S. Car.), 378; *American Bank v. Rollins*, 99 Mass. 313; *Perkins v. Guy*, 2 Mont. 15. In *Drake, Attachment*, § 625, it is said: "However strongly these reasons apply to the case of a garnishment of the judgment debtor in the same court in which the judgment was rendered, their force is lost when the judgment is in one court and the garnishment in another. There a new question springs up, growing out of the conflict of jurisdiction which at once takes place. Upon what ground can one court assume to nullify in this indirect manner the judgments of another? Clearly, the attempt would be absurd, especially where the two courts were of different jurisdictions or existed under different governments. Take, for example, the case of a court of law attempting to arrest the execution of a decree of a court of equity for the payment of money, by garnishing the defendant; or that of a state court so interfering with a judgment of a federal court, or *vice versa*; it is not to be supposed that, in either case, the court rendering the judgment or decree would or should tolerate so violent an encroachment on its prerogatives and jurisdiction." * * * [*630]

* * * In Michigan it has been held that a judgment recovered be-

fore one justice of the peace is not subject to proceedings in garnishment before another justice. *Sievers v. Woodburn Sarven Wheel Co.*, 43 Mich. 275; *Noyes v. Foster*, 48 Mich. 273; *Custer v. White*, 49 Mich. 462. It [*631] has likewise been decided that a judgment obtained in the circuit court of a state cannot be garnished before a justice of the peace. *Clodfelter v. Cox*, 33 Tenn. (1 Sneed) 330. To allow a judgment to be garnished in a court other than the one in which it was rendered would subject the debtor to a double judgment on a single liability, and thereby subject him to the danger of being compelled to pay the debt twice. Besides, it would permit one court to interfere with the due execution of process in another tribunal. We are unwilling to place a construction upon the statutes that is liable to lead to such results. Upon principle and authority we are constrained to hold that the garnishment proceedings in the county court, in the case of *Scott v. Lanham*, were void, and consequently created no lien upon the fund in controversy.

In the brief of appellant it is said: "All opportunity for conflict of jurisdiction, or for injustice has been avoided by the payment of the entire amount of the Lanham judgment into the district court, and the bringing of the equity proceedings in which all parties interested are made defendants, where all the parties can have their rights adjusted. The garnishee can be protected from double payment and his judgment creditor compelled to satisfy the judgment of record." This position might, and doubtless would, be tenable were it not for the fact that Lanham, plaintiff's debtor, assigned his judgment against Fitzgerald to the defendant C. H. Rohman, which assignment was filed in the district court of Lancaster county, according to the fifth finding of fact, on April 10, 1893, several months prior to the institution of this equitable action. Therefore, Lanham had no interest in the judgment or the money paid into court when this action was commenced, and, as we have already shown, the garnishment proceedings created no lien upon the money in dispute. There is no room to doubt that when a judgment has been assigned it is not liable thereafter to garnishment at the suit of the creditor of the assignor. * * *

Affirmed.

HUDSON v. SAGINAW CIRCUIT JUDGE.
114 Michigan 116, 72 N. W. 162, 47 L. R. A. 345. (1897)

**Garnishment Against Officers of Courts—Liability of Property in Their Possession to Process—Limitation of Exemption—
Power of Court to Waive Exemption.**

Mandamus by Joseph L. Hudson, receiver of the Third National Bank of Detroit, to compel Eugene Wilber, circuit judge of Saginaw county, to vacate an order quashing a writ of garnishment issued against Charles B. Gray and Edward Y. Swift, executors of the last will and testament of Aaron C. Fisher, deceased, as garnishee defendants of John E. Nolan.

De Forest Paine, for relator.

William G. Gage, for respondent.

Hooker, J. Nolan brought an action against Aaron C. Fisher in his lifetime, which culminated in a judgment against his executors, the same being affirmed by this court in 111 Mich. 56. Thereupon the relator garnished the executors, but the circuit court dismissed the proceedings, after disclosure, upon the ground that garnishment would not lie against executors.

It is a general rule that property in custody of the law is not subject to attachment or garnishment. The law [*117] does not permit one court to assume control over the representative of another court, or the property confided to his charge. By this it is not meant that personal remedies against the individual may not be sought, but that any proceeding in the nature of an action *in rem*, whereby it is sought to reach the property which another court has taken possession of, is forbidden. Thus replevin from an officer holding under order of the court of chancery is punishable as a contempt. Even suits against a receiver in his representative capacity are forbidden, though the court appointing the receiver may, on cause shown, permit them. The probate court has not even this power respecting its officers, who can only be sued in the manner pointed out by statute, and a garnishee proceeding is not included among statutory proceedings against executors and administrators in Michigan, though it is in some states.

That administrators and executors are exempt from this process is the general rule. In *Rood*, *Garnishm.*, § 27, it is said:

“ ‘When property or money is *in custodia legis*, the officer holding it is the mere hand of the court. His possession is the possession of the court. To interfere with his possession is to invade the jurisdiction of the court itself. And an officer so situated is bound by the orders and judgments of the court, whose mere agent he is, and he can make no disposition of it without the consent of his own court, express or implied.’ *In re Cunningham*, 9 Cent. L. J. 208. These principles have been applied in numerous cases to various classes of legal custodians, and in accordance with them it has been held that clerks of courts, trial justices, registers in chancery, masters in chancery, receivers, trustees appointed by a court of chancery, assignees in bankruptcy, trustees for creditors under a general assignment pursuant to insolvent laws, other trustees appointed to dispose of property and apply the avails according to the orders of the court, sheriffs, constables, and other ministerial officers, and their bailees and assistants, justices of the peace, executors, administrators, and guardians, cannot be charged as garnishees by reason of any property or money which they hold or any debts which they owe merely as such officers.” [*118] In his next section the author says that: “In a few of the states, while these principles are recognized as sound, they have been considered inapplicable to certain of the cases above mentioned, either generally or in view of the peculiar provisions of the statute governing the conduct of the particular officer. Among these may be mentioned sheriffs and constables, clerks in chancery courts, justices of the peace, administrators, and executors.”

Among the cases cited by the author is *Hardesty v. Campbell*, 29 Md. 533, where the decision rests upon the Code. In the Alabama cases the question is not raised, and, though the jurisdiction over an administrator seems conceded, it rests upon a statute, which is not quoted. Against the few states, the author cites to the contrary cases involving administrators, from Massachusetts, Maine, Arkansas, West Virginia, Rhode Island, Delaware, Vermont, Indiana, and Missouri, to say nothing of a cloud of analogous cases relating to other officers.

Mr. Shinn, in his treatise on Attachment and Garnishment (§ 510), says: “In the absence of special statute, it was an undis-

puted rule of law that an executor or administrator could not, in his official capacity, be held liable as a garnishee at suit of a creditor of the decedent or of one who was a legatee or distributee or other creditor of the estate. He is not then considered to be a 'debtor.' Neither is he an agent, factor, attorney, or trustee of such creditor, because he derives his authority from the law, and is obliged to execute it according to law." * * *

He admits, however, that in many states this rule has been changed *by statute*, and a long list of cases is given. It goes without saying that decisions based upon a statutory right of garnishment are not to be considered as authority for changing the general rule, unless by analogy a similar construction should be indulged. The author says of the administrator's liability, where he may be garnished, that—

"In states permitting an executor or administrator to be made a garnishee, he may be held as such whenever the person to whom he is to pay the legacy or distributive share may maintain an action at law against such executor or administrator. After a court has decreed a distribution of the proceeds in the hands of the administrator, such administrator may be held as garnishee. Some statutes permit an executor or administrator to be made a garnishee during the pendency of the settlement of the estate, but no judgment can be rendered against him until a settlement is made, unless he assents to the legacy or admits assets to pay the amount claimed out of the distributive share. Until the distributive shares are ascertained, they cannot be secured by garnishment. In other words, when it is uncertain whether the administrator will have a surplus in his hands or not, he cannot be held as garnishee." 2 Shinn, *Attachm.* § 511, and cases cited.

In 8 Am. & Eng. Enc. Law, 1139, a paragraph denying the liability concludes as follows, after citing *Brooks v. Cook*, 8 Mass. 246: "The court held that, as the administrator derived his authority from the law, * * * he was not liable to process of this kind, and such has been the almost uniform current of authority, including cases as to executors as well."

The language of Mr. Rood, who is quoted in support of the doctrine that "the great preponderance of modern authorities

* * * holds that, when the purposes of the court have been fully accomplished in respect to the particular funds, *by a final* decree or order for payment of the same to the defendant by such officer, or his becoming *directly* and *absolutely* accountable to the defendant therefor without such order, such property or credit may be reached by garnishing such officer" (Rood, Garnishm. § 32), if approved, should not be applied to this case, for the probate court is not shown to have made a *decree* or *order* for *payment*, nor have the executors become *directly* and *absolutely* accountable to the principal defendant. Such liability becomes fixed when distribution is ordered under §§ 5925 to 5931 of 2 Howell's Annotated Statutes. It does not rest in the authority of other [*120] tribunals to determine the status of a fund in the custody of the probate court.

It is said that in *Cohnen v. Sweeney*, 105 Mich. 643, this court held that a receiver might be garnished with permission of the court that appointed him. The exercise of discretion by a court of chancery having jurisdiction of the fund is a very different thing from the power of other courts to determine what shall be done with it. That case does not rule this. I am unable to see the propriety of holding that the liability or non-liability of an executor becomes a question of fact, dependent upon the quantity of assets and ability of the executor to pay, to be tried by jury or otherwise in as many courts as there are garnishing creditors, to the embarrassment of the settlement of estates, and the overthrow of one of the best-settled rules of general application known to the law. The writ is denied, with costs.

Montgomery and Moore, JJ., concurred with *Hooker, J.*

Grant, J. (dissenting). * * * The executors filed a disclosure, in which they admitted the judgment against them, and that the money was in their hands ready to be paid to such persons as were legally entitled to receive it. The court quashed the proceedings on the ground that a suit of garnishment would not lie against an executor or administrator.

The court granted the order, evidently relying upon *White v. Ledyard*, 48 Mich. 264. That case differs in its facts from this, in that the garnishee defendant died without making disclosure,

and the cause was revived against his administrator, while in this the original suit is directly [*121] against the executors. The reason for that decision is found in this statement: "When the cause was revived against the administrator, he, as such, had neither the requisite knowledge nor authority to make a disclosure binding upon the estate." Clearly this statement does not apply to the present case, where the liability of the garnishee executors to Nolan is fixed by the judgment of the court. * * * Under the disclosure in this case there is no embarrassment of the executors or delay in settling the estate. The right of Mr. Nolan is fixed by the judgment, and the executors have the money with which to pay it. Courts are not uniform in their holdings upon this question. There are those which hold that when the rights of all parties have become fixed, and all that remains is the payment of the money, which is in the hands of the administrators or executors, the fund is subject to garnishment. * * * [*122] * * * Whether an order has been made by the probate court directing the executors to pay the debts as provided in 2 How. Stat. § 5925 *et seq.*, does not appear. No such order is necessary to authorize them to pay. No such claim is made. The estate is settled, except the payment of the debts and the distribution of the estate in accordance with the will. Nothing but payment remains to be done. The executors cannot be embarrassed, as they admit they are ready to pay. If executors can ever be garnished, I see no reason why they cannot in this case.

We think the court was in error in quashing the proceedings, and therefore the writ should issue, but without costs.

Long, C.J., concurred with *Grant, J.*

HOLKER v. HENNESSEY.

141 Missouri 527, 64 Am. St. 524, 42 S. W. 1090, 39 L. R. A. 165. (1897)

Garnishment—Right of Officer Making Arrest to Search Prisoner—Levy Accomplished by Fraud or Abuse of Process, Effect—Property in Custodia Legis, Liability to Process.

Garnishment against B. F. Pixler, sheriff of Nodaway county, in an action by Holker against Hennessey and Green to recover \$5,000, of which Holker claims to have been robbed by them. The garnishee was discharged and plaintiff appeals. Affirmed. The

sheriff took two revolvers and several hundred dollars from the defendants when he arrested them in Nebraska on a criminal prosecution for grand larceny.

Frank Griffin and W. W. Ramsay, for appellant.

E. A. Vinsonhaler, for respondent.

The Court by Macfarlane, J. * * * The only question raised by this record is whether or not this money taken from the person of these prisoners when arrested, and still held by garnishee officially as sheriff, is subject to garnishment, in an attachment suit in favor of plaintiff and against defendants, the subject of the suit being damages on account of the alleged crime.

It has been held in this state, and is generally recognized as the law, that in a civil action, service of a process upon a defendant, who is brought into the territorial jurisdiction of the court by fraudulent means or criminal process, will be set aside if timely objection is made thereto. *Byler v. Jones*, 79 Mo. 261; *Christian v. Williams*, 111 Mo. 435, and cases cited. So it is held that "where an officer unlawfully gets possession of a debtor's property, as by breaking into his dwelling house without proper authority, and then attaches it on *mesne* process or levies upon it on execution, the attachment or levy will be void." *Closson v. Morrison*, 47 N. H. 485; citing, *Ilseley v. Nichols*, 29 Mass. (12 Pick.) 270; *People v. Hubbard*, 24 Wend. (N. Y.) 369; *Curtis v. Hubbard*, 4 Hill (N. Y.) 437, and other cases. This seems to be the modern doctrine founded upon the principle that courts will not lend their assistance to effectuate fraudulent or unlawful practices of suitors, though the old doctrine was that the seizure under process in such case would be valid, while the officer making it would [*537] be liable for the trespass. See *People v. Hubbard*, *supra*.

In the case of *Closson v. Morrison*, *supra*, the sheriff arrested a person under a charge of grand larceny and before trial or examination, proceeded, on his own motion, to search the prisoner, and took from his person some money, a watch, watch chain and wallet. On the next day writs of attachment were issued against the prisoner and placed in the hands of the sheriff, and he thereupon attached the money and other property. The court, in giving its judgment, says: "The money and other articles were proper

articles to attach, if the officer could rightfully obtain possession of them, without arresting the debtor, which the writ did not warrant him in doing. Now, if the officer took advantage of his warrant and the arrest under it, to take from his prisoner this property, not for any legitimate purpose, but simply for the purpose of attaching it on these writs, that would be obtaining possession of the property under false pretenses and fraudulently, which would make the possession to stand like the unlawful possession in case of breaking into the house in the other case, and would not justify the attachment." The court held that if this property was lawfully taken from the person of the debtor, it was subject to attachment while in the hands of the sheriff.

The same ruling was made by the supreme court of Iowa in the case of *Reifsnyder v. Lee*, 44 Iowa, 102. *Beck, J.*, in delivering the opinion, says: "A party to a suit can gain nothing by fraud or violence under the pretense of process, nor will the fraudulent or unlawful use of process be sanctioned by the courts. In such cases, parties will be restored to the rights and position they possessed and occupied before they were deprived thereof by the fraud, violence, or abuse of [*538] legal process." Money and a watch had also been taken from the person of the prisoner in that case, and the court held that the officer was authorized to make the search and take into his possession such property, and the levy of the attachment upon it while so held was valid. In a subsequent case, however, the same court held that where the sheriff took from the person of a prisoner two watches and some money, which were in no way connected with the crime with which he was charged, and which could not be used as evidence in the prosecution, it was his duty to return them, and while he retained them his possession was that of the prisoner, and they were "no more liable to attachment in an action against the prisoner than if they had been in his pocket." The court says: "To hold otherwise would lead to unlawful and forcible searches of person under cover of criminal process as an aid to civil actions for the collection of debts." *Bank v. McLeod*, 65 Iowa, 666.

We find the same ruling by the supreme judicial court of Massachusetts, in the cases of *Robinson v. Howard*, 7 Cush. 257,

and *Morris v. Penniman*, 14 Gray, 220. In the former case * * * *Shaw, C. J.*, says: "Such process might be used to search the person, or otherwise, under color of lawful authority, to get possession of the property of a debtor, in order to place it in the hands of the officer, and thus make it attachable under trustee process." In the latter case one Bassett was arrested on a charge of larceny. On being asked what property he had about him, he delivered up, without objection, a watch and key. While [*539] they were in possession of the officer they were attached on process against Bassett. On this state of facts the court held that "the attachment of the watch and key was not valid."

A sheriff in Texas took from the person of a prisoner \$950 in money, and other property. While in his possession the officer was served with process by garnishment. Knox, the prisoner, intervened and claimed that the property in the hands of the sheriff was in the custody of the law and was not subject to garnishment at the suit of a creditor. On appeal this plea was sustained on the ground that the property was not subject to process by garnishment. *Richardson v. Anderson*, 4 Tex. App. Civ. Cas. 493, 18 S. W. 195.

The supreme court of Alabama reaches a different conclusion under a provision of the code of that state. The court, however, in discussing the question, says: "At common law, and perhaps without statute, the money or property" taken from the person of the prisoner, "would be *in gremio legis*, not subject to attachment, and entirely under the control of the court." *Ex parte Hurn*, 92 Ala. 109. * * * [*540]

We find no statute of this state giving the arresting officer authority to search a prisoner, but no statute is necessary. The power exists from the nature and objects of the public duty the officer is required to perform. * * *

We have no doubt the search of the prisoners in this case was entirely justifiable, considering the nature of the crime charged and other circumstances. In the circumstances, also, he was justified in taking from their persons and keeping in his possession the money found upon them, though it may have been in no manner connected with the charge or proof against them. Money is

the most effective kind of property a prisoner could have in his possession to be used as a means of escape. * * * [*541] * * *

The sheriff being an officer of the court in which the indictment is pending, the money is in custody of the court subject to its order. The rule of general application is that money or property which has come into the hands of an officer of a court by virtue of legal process is regarded as in the custody of the law and can not be taken from him under other process, either of execution, attachment, or garnishment. Shinn on Attachment, § 505; 2 Wade on Attachment, §§ 330, 421; Kneel on Attachment, § 410; Waples on Attachment, § 390; 8 Am. and Eng. Ency. of Law, 1137. * * * [*543] * * *

It is therefore our opinion that if the money and property were taken from the persons of the prisoners by authority of law, which the sheriff would be estopped to deny, it was in the custody of the law and subject to the orders of the court in which the criminal proceedings were pending, and was not, at least until after conviction, subject to attachment at a suit of a creditor of the prisoner. If, on the other hand, it was taken without authority of law, then it is not subject to attachment because a wrongful use was made of criminal process in getting possession. * * *

Affirmed.

Under similar facts the supreme court of Michigan, in a recent case, reversed a judgment against a garnishee, saying: "It is true that there was no collusion shown in this case, but in all cases it might be difficult to show actual collusion, and we think the safe rule is that which excludes the possibility." Hubbard v. Garner, 115 Mich. 406, 73 N. W. 390.

8. WHAT MAY BE TAKEN UNDER ATTACHMENTS AND EXECUTIONS.

Any property capable of manual seizure is as liable to be taken under execution or attachment as by garnishment. Therefore, again go over the cases under the last preceding head with this thought in mind. Also, read *Pennoyer v. Neff*, ante, 48; *Sir William Harbert's Case*, ante, 138; *Keniston v. Little*, ante, 231; *Gardner v. Mobile & N. Ry. Co.*, ante, 238; *Klein v. New Orleans*, ante, 258.

HAGAN v. LUCAS.

35 United States (10 Peters) 400. (1836)

Property in Custodia Legis—Priority of Jurisdiction—Effect of Release on Claimant Bond.

This is a proceeding instituted in the district court of the United States for the southern district of Alabama, according to the statutes of that state, by Charles F. Lucas, as claimant of property theretofore seized by the marshal of said court on an execution on a judgment of said court in favor of John Hagan against Wm. D. Bynum and A. M'Dade. From judgment in favor of the claimant plaintiffs bring error. Affirmed.

In support of his claim Lucas gave in evidence duly certified copies of the records of three judgments against said Bynum and M'Dade, rendered by the the circuit court of Montgomery county, Alabama, and of executions thereon, under which the sheriff of said county had returned levies upon the property involved in this proceeding; and of an affidavit of said Lucas thereafter made and filed in said circuit court alleging that the said property belonged to said Lucas; and of a bond at the same time executed by said Lucas to said sheriff, according to the statute, for the forthcoming of said property if it should be found subject to said executions; and that on the execution and delivery of said bond said sheriff delivered said property to said Lucas, from whose possession it was afterward taken by said marshal on the execution afterward issued by said district court of the United States. Upon this evi-

dence the district court instructed the jury that if they believed this evidence and that the claim in the circuit court of Alabama county was still pending and undetermined, the property was in the custody of the law and not liable to levy by the marshal. To this instruction plaintiffs except.

The Court by McLean, J. * * * Had the property remained in the possession of the sheriff, under the first levy, it is clear the marshal could not have taken it in execution; for the property could not be subject to two jurisdictions at the same time. The first levy, whether it were made under the federal or state authority, withdraws the property from the reach of the process of the other. Under the state jurisdiction, a sheriff having execution in his hands, may levy on the same goods; and where there is no priority on the sale of the goods, the proceeds should be applied in proportion to the sums named in the executions. And where a sheriff has made a levy, and afterwards receives executions against the same defendant, he may appropriate any surplus that shall remain, after satisfying the first levy, by the order of the court. But the same rule does not govern where the executions, as in the present case, issue from different jurisdictions. The marshal may apply moneys, collected under several executions, the same as the sheriff. But this cannot be done as between the marshal and the sheriff. A most injurious conflict of jurisdiction would be likely, often, to arise between the federal and the state courts; if the final process of the one could be levied on property which had been taken by the process of the other. The marshal or the sheriff, as the case may be, by a levy, acquires a special property in the goods, and may maintain an action for them. But if the same goods may be taken in execution, at the same time by the marshal and the sheriff, does this special property vest in the one, or the other, or both of them? No such case can exist; property once levied on, remains in the custody of the law, and it is not liable to be taken by another execution, in the hands of a different officer; and especially by an officer acting under a different jurisdiction. But it is insisted in this case, that the bond is substituted for the property; and consequently that the property is released from the levy. The law provides that the property shall

be delivered into the possession of the claimant, on his giving bond and security in double the amount of the debt and costs, that he will return it to the sheriff if it shall be found subject to the execution. [*404] Is there no lien on property thus situated, either under the execution or the bond? That this bond is not in the nature of a bond given to prosecute a writ of error, or on an appeal, is clear. The condition is, that the property shall be returned to the sheriff, if the right shall be adjudged against the claimant. Now it would seem that this bond cannot be considered as a substitute for the property, as the condition requires its return to the sheriff. The object of the legislature in requiring this bond, was to insure the safe keeping and faithful return of the property, to the sheriff, should its return be required. It, then, the property is required by the statute and the condition of the bond to be delivered to the sheriff on the contingency stated, can it be liable to be taken and sold on execution. If the property be liable to execution, a levy must always produce a forfeiture of the condition of the bond. For a levy takes the property out of the possession of the claimant, and renders the performance of his bond impossible. Can a result so repugnant to equity and propriety as this, be sanctioned? Is the law so inconsistent as to authorize the means by which the discharge of a legal obligation is defeated, and at the same time exact a penalty for the failure. This would indeed be a reproach to the law and to justice. The maxim of the law is, that it injures no man, and can never produce injustice.

On the giving of the bond, the property is placed in the possession of the claimant. His custody is substituted for the custody of the sheriff. The property is not withdrawn from the custody of the law. In the hands of the claimant, under the bond for its delivery to the sheriff, the property is as free from the reach of other processes, as it would have been in the hands of the sheriff.

In Holt 643, and 1 Show. 174, it was resolved by Holt, chief justice, that goods being once seized and in custody of the law, they could not be seized again by the same or any other sheriff; nor can the sheriff take goods which have been distrained, pawned

or gaged for debt; 4 Bac. Ab. 389; nor goods before seized on execution, unless the first execution was fraudulent, or the goods were not legally seized under it. * * * [*405]

In *Lusk v. Ramsay*, 3 Munford (Va.) 417, the court decided that the lien, by virtue of a writ of *fi. facias*, upon the property of the debtor, is not released by his giving a forthcoming bond, but continues until such bond is forfeited. In that case, the defendant's property having been levied on by an execution in the hands of the sheriff, was suffered to remain in his possession, on his giving a forthcoming bond for the delivery of the goods on the day of sale; but before the day of sale the defendant delivered the goods in satisfaction of another execution, and the question was made whether the forthcoming bond released the lien of the first execution. In his opinion, Judge Roane draws the following distinctions between a forthcoming bond, and what is called a replevy bond, under the statute of Virginia. 1. A replevy bond under the act operated a release of the property. 2. Because the surety therein is to be approved by the creditor: a circumstance very material in a bond considered as a substitute for an execution, and wanting as to the sureties upon forthcoming bonds. 3. Because a replevy bond obtained the force of a judgment by the mere giving thereof; though its execution was suspended till the expiration of the three months, and did not owe its obligation, as a judgment, to the breach of the condition thereof, as is the case of forthcoming bonds.

The bond given by the claimant Lucas, bears a strong analogy to a forthcoming bond. By the latter, the goods were to be delivered to the sheriff on the day of sale; by the former, the goods delivered to the sheriff, so soon as the right shall be determined against the claimant. In neither bond is the plaintiff in the execution consulted, as is done in a replevy bond, as to the sufficiency of the surety; nor do either of these bonds, like the replevy bond, operate as a judgment, until a breach of the condition. In fact, the bond under the Alabama statute is substantially a forthcoming bond. * * * [*406]

We think, that part of the charge to the jury by the district court which respected the pendency of the suit in the state court,

and which was excepted to, was substantially correct: and we are of opinion, that on principle and authority, and also under the construction given to the statute by the supreme court of the state, the judgment of the district court must be

Affirmed.

DAWSON v. HOLCOMB.

1 Ohio (1 Hammond) 275, 13 Am. Dec. 618. (1824)

Proceeds of Execution Sale—Liability to Levy—Sheriff's Duty to Return.

Motion on notice by Dawson, execution creditor, for the amercement of Holcomb, sheriff of Gallia county, for misappropriating money made on execution in favor of Dawson. The sheriff's defense was that after making the money on Dawson's execution, and while the money remained in his hands, he received a writ of attachment against Dawson which he levied upon the money. From an order overruling the motion Dawson brings error. Reversed.

Opinion Per Curiam. We see nothing in this case that could protect the sheriff against the motion to amerce. By the terms of the writ of execution, he was not merely commanded to make the money, but to have it before the judges on the return day, to satisfy the plaintiff. In strictness of law, he was not at liberty to pay it over to the judgment creditor before he brought it into court, and although this is often done with impunity, yet it is always at the risk of the officer, and if a third person should appear from the record to have an equitable right to the money, it would become a question whether such payment would exonerate the officer.

The form of the writ, as far as it goes, is good evidence of the duty of the sheriff. He may be held to a literal compliance with it, and whenever that is dispensed with, it is not because he has a legal right to do so, but because the court are presumed to have permitted it. While the money remains in the hands of the officer, it is in the custody of the law. It does not become the property of the judgment creditor till it is paid over, and consequently is not liable to be attached as his. The writ of attachment could not supersede the execution, or release the sheriff from a literal compliance with its command, which required him

to bring the money into court, so that it might be subject to their order. Cases frequently occur, in which the right to receive the proceeds of a judgment is contested, and in which the decision of the court is necessary as a guide to the officer.

It will not be contended that he is the proper person to determine the rights of claimants; but if he may legally dispose of the money, before the return of his writ, that power is necessarily vested in him. In the case of *Ross v. Clark*, 1 Dallas (Pa.) 354, the defendant had obtained a judgment against Ross, who paid the money into the hands of the prothonotary, and then attached it. On a rule to show cause, the court quashed the writ, because the money in the hands of the prothonotary was to be considered in the same state as if it had been paid into the hands of the sheriff. In the case of *Turner v. Fendall*, 1 Cranch, 117, it was the opinion of the court that, although money could be taken in execution, if in the possession of the defendant, yet that it could not be so taken till it had been paid over to the person entitled to receive it, because, until so paid, it does not become his property—he has not the actual legal ownership of the [*277] specific pieces of coin which the officer may have received. Such a right, say the court, can only be acquired by obtaining the legal or actual possession of them, and until this be done, there can be no such absolute ownership as that an execution may be levied on them. By the authority of this case, the money in question was not liable to an execution while in the hands of the officer. It would be difficult, then, to assign a reason why it should be subject to an attachment, for, in this case, as well as in the other, it is necessary that the thing taken should be the property of the person against whom the process issues. * * *

A strong argument might also be drawn from the mischievous consequences that would follow such a course of practice. It would lead to endless delay and vexation. One attachment might follow another, till the whole demand was absorbed in cost. The honest creditor, on the eve of receiving the fruit of his judgment, might find himself farther from his object than when he sued out his original process. In short, the introduction of such a practice would measurably defeat the aim of legal process, as far as it is resorted to for the recovery of money.

We are clearly of opinion that the sheriff's return contains no apology or excuse for the non-payment of the money, and that he ought to have been amerced [*278] on the motion of the plaintiff. * * *

Judgment reversed.

HANDY v. DOBBIN.

12 Johnson Rep. (New York) 220. (1815)

Liability of Money and Bank-Bills to Attachment and Execution—Comparative Scope of the Processes.

Attachment in justice court by Dobbin against Handy levied on two five-dollar bank bills belonging to Handy. Defendant brings error on *certiorari* from judgment for plaintiff in the justice's court. The only error relied on was that these bills were not liable to be attached.

The Court by Spencer, J. There can be no doubt that the constable, under the attachment, could take any goods and chattels, which could be levied on by execution. The authority in both cases is the same. *Bank bills* are treated, *civiliter*, as money; a tender in them is good, unless it be specially objected to at the time. The question then is narrowed to this, Can money be levied on by an execution? This court, in *Williams v. Rogers*, (5 Johns. 167), intimated strongly their concurrence in the decision of the supreme court of the United States on this point. In that case (*Turner v. Fendall*, 1 Cranch, 133), all the cases on the point were reviewed, and it was held that money could be levied on. We now fully concur in the doctrine there advanced; we perceive no objection in principle, why money should not be taken in execution. It is the goods and chattels of the party; and it appears to us to comport with good policy as well as justice, to subject every thing of a tangible nature, excepting such things as the humanity of the law preserves to a debtor, and mere *choses in action*, to the satisfaction of a debtor's debts.

Judgment affirmed.

CONN v. CALDWELL.
6 Illinois (1 Gilm.) 531. (1844)

Proper Form of Execution on Judgment in Action Commenced by Attachment—Effect of Personal Service—Effect of Appearance—Abandonment of Levy by Giving up Possession.

Attachment. Defendants bring error. Modified.

A. W. Jones, for appellants.

N. D. Strong, and *J. H. Hall*, for appellee.

The Court by Treat, J. On the 24th day of February, 1842, Joseph Caldwell sued out of the Madison circuit court, an attachment against Joseph H. Conn, James R. Sprigg and William W. Greene. The writ of attachment was levied on certain real estate, and on the steamboats "Capsian" and "Osage." The sheriff's return stated, that on the day succeeding the levy, the steamboats were released by order of the sheriff.

The declaration was in *assumpsit*, on three promissory notes. The defendants appeared and pleaded *non assumpsit*. On the 4th day of October, 1842, this issue was heard by the court, and found for plaintiff, and his damages assessed at the sum of \$12,923.46. A judgment was thereupon rendered, that the plaintiff recover of the defendants the said sum and costs; that he have execution therefor, to be levied of the real estate attached, and the steamboats "Capsian" and "Osage;" and also, that he have execution generally for his damages and costs. To reverse that judgment, the defendants prosecute a writ of error.

Since the suing out of the writ of error, the original return of the sheriff on the writ of attachment has been amended in the circuit court, and the amendment certified into this court, and made part of the record. It appears from the amended return, that the steamboat "Osage," at the time of the levy, was freighted and on her passage from St. Louis to the ports on the Illinois river; that it was agreed between the plaintiff and the master, that the boat should proceed on her voyage, and return, and be delivered to the sheriff, subject to the attachment; that the boat was thereupon released, for the purpose of the voyage, but has never been re-delivered.

The errors assigned questioned the propriety of the judgment

entered. It is insisted in the first place, that the judgment [*536] is erroneous, because it awards execution generally against the defendants.

Where a judgment in default is rendered in a suit by attachment, without personal service of process on the defendant, the judgment is *in rem*, and the estate attached is alone liable for its payment. In such case, a special execution issues for the sale of the specific property. But where the defendant is served with process, or appears to the action, the judgment is *in personam*, and the plaintiff is entitled to a general execution thereon. In this case, the defendants pleaded to the declaration, and the cause was fully determined to the merits. The judgment is, therefore, as conclusive between the parties, as if the action had been instituted in the ordinary way. The plaintiff having the right to a general execution on the judgment, the court committed no error in awarding it.

In the next place, it is insisted that the judgment is erroneous in awarding a special execution. It is contended, that the property attached was released by the appearance of the defendants. This position is not tenable. This precise question was before this court at the present term, in the case of *Martin v. Dryden*, 6 Ill. 187. This court there held, that an appearance of the defendant did not, of itself, discharge the property attached; but that the defendant in order to release it from the lien acquired by the levy, must either replevy the property, or give security for the payment of whatever judgment may be rendered in the cause, as provided in the 29th section of the attachment act. In this case the defendants neither replevied the property, nor gave special bail. The lien created by the levy became perfect by the judgment, and the plaintiff was entitled to a special execution for the sale of the property, except such as he had voluntarily relinquished.

The circuit court decided correctly in embracing the steamboat "Osage" in the award of execution. / That boat was released from the custody of the sheriff, for the purpose of the voyage, with the express understanding that the boat should be re-delivered and continue subject to the attachment. [*537] The lien on the boat was not thereby extinguished, but still subsists as between the par-

ties to this suit.) If, in the meantime, third persons have become interested in the boat, a different question may arise.

The steamboat "Caspian" was absolutely released, and the judgment is erroneous in including it in the award of execution. For this error, the judgment must be reversed with costs. The cause, however, need not be remanded. It was fully adjudicated in the court below, and the proper judgment can be entered in this court. A judgment must be rendered here, that the plaintiff recover of the defendants the sum of \$12,923.46, with legal interest from the 4th day of October, 1842. On this judgment, the plaintiff can have execution generally, and also a special execution for the sale of the real estate attached, and the steamboat "Osage."

Judgment reversed.

9. WHAT CONSTITUTES A VALID LEVY AND SERVICE.

A levy can be regular only when made by a proper person, on a proper writ, at a proper time and place, etc., all of which we have considered, and will here review. But under this head our attention is particularly directed to discovering what acts would be fatal, and what are essential, to a levy. For that purpose re-read: *Michels v. Stork*, ante, 83; *Pracht v. Pister*, ante, 179; *Green v. Burke*, ante, 205; *Portis v. Parker*, ante, 286; *Burton v. Wilkinson*, ante, 316; *McGregor v. Brown*, ante, 342; *Holker v. Hennessey*, ante, 413; *Hagan v. Lucas*, ante, 418; *Dawson v. Holcomb*, ante, 422.

BAILEY v. WRIGHT.

39 Michigan 96. (1878)

Execution—Trespass in Levying—Effect.

Replevin by Lenna E. Wright against Alvin W. Bailey and William Tinker in Barry circuit court. Judgment for plaintiff, and defendants bring error. Affirmed.

C. G. Holbrook and J. Carveth for plaintiffs in error.

Sweezy & Knappen, for defendant in error.

The Court by Campbell, C. J. Defendant in error replevined a piano from plaintiffs in error, who defend on the ground that she purchased from one Ackley, and that the purchase was void as against a levy made by them upon an attachment against him. [*97]

Several questions are presented on the record, but inasmuch as the only defense was under the levy, the validity of that is the first matter to be considered.

The defendants by their own testimony showed that while Ackley was temporarily absent, and his house, where his wife was present at the time, was locked up, they broke into it by violence and seized the piano upon the writ. It is admitted this was a trespass, but it is claimed the levy may be a good levy in spite of the wrongful acts by which it was accomplished.

We think this is too dangerous a doctrine to be tolerated. Public policy requires above all things that courts and officers executing their process shall respect the lawful rights of all persons. The practical permission which over-zealous officers would receive to commit wrongs with substantial impunity, if their levies should be held good without regard to the manner of their enforcement, would remove every check on lawlessness. To hold that an act is lawful which may be lawfully resisted is absurd. Such misconduct should neither be justified nor winked at. Any officer who breaks the law should be held to be entirely without excuse, and as fully responsible as any other malefactor.

The doctrine on this subject is so fully discussed in *Ilsiev v. Nichols*, 29 Mass. (12 Pick.) 270; 22 Am. Dec. 425, and *People v. Hubbard*, 24 Wend. (N. Y.) 369; 35 Am. Dec. 628, that we need not go into any further investigation. The doctrine is sensible and just, and is the only one whereby private safety and public peace can be preserved. There can be no respect for courts and their process if their ministers are upheld in violations of law, or if they can be lawfully opposed in exercising their functions, as they may be if such levies are held valid.

As the defense entirely failed, it is not important what rulings were made on other points. Judgment must be affirmed with costs.

HOLLISTER v. GOODALE.

8 Connecticut 332, 21 Am. Dec. 674. (1831)

Execution—What Constitutes a Levy.

Trespass for taking and carrying away a barouche and harness. Both parties claim as constables levying under attachments against H. Benton. Plaintiff claimed that he obtained the key to the carriage-house where the property was, unlocked the door, attached the barouche, declaring that he attached all carriages and harnesses in the house, and that while he was attempting to remove the carriage defendant forcibly took it from him and afterward sold it. Defendant claimed that he hid near the carriage-house, and that when plaintiff unlocked the door defendant first entered and seized the barouche, and afterward returned and took the harness. The court instructed the jury that if the plaintiff was at the door with writ and key, and unlocked the door and proclaimed his levy before defendant attached, they should find for plaintiff, and defendant moves for a new trial. Granted.

Toucey, for the motion.

Hungerford and Merrick, contra.

The Court by Hosmer, C.J. The inquiries in the case, are, what constitutes a legal attachment; and whether on this subject, the charge was correct.

1. The word *attach*, derived remotely from the *Latin* term *attingo*, and more immediately from the *French* *attacher*, signifies to take or touch, and was adopted as a precise expression of the thing; *nam qui nomina intelligit, res etiam intelligit*.

The only object of attachment is to take out of the defendant's possession, and to transfer into the custody of the law, acting through its legal officer, the goods attached, that they may, if necessary, be seized in execution, and be disposed of and delivered to the purchaser. From both these considerations it is apparent, that to attach is to take the *actual* possession of property. Hence, the legal doctrine is firmly established, that to constitute an attachment of goods, the officer must have *the actual possession and custody*. It was laid down in these express words,

by *Parsons, C. J.*, in *Lane v. Jackson*, 5 Mass. 157, 163, and by *Parker, C. J.*, in *Train v. Wellington*, 12 Mass. 495, 497. Nor is there, so far as my investigations have enabled me to discover, a single determination opposed to the preceding principle.

The case of *Turner v. Austin*, 16 Mass. 181, decided, that no overt act, by the sheriff, was necessary to constitute an attachment of property, previously in his custody on another attachment. But this is entirely consistent with the principle [*335] advanced. The sheriff already had the actual custody; and mere form of ceremony, *for form's sake*, and not for the preservation of substance, can never be required.

It was likewise adjudged in *Denny v. Warren*, 16 Mass. 420, that an officer, who entered a store to attach goods, where there was no competition, received the key from the clerk and locked up the store, having declared his intention to attach, had made a sufficient attachment. And in *Gordon v. Jenny*, 16 Mass. 465, the determination was to the same effect.

So in *Naylor v. Dennie*, 8 Pick. 198, it was decided, that inaccessible goods, covered up in the hold of a ship, were attached, by the officers' going on board, and leaving a keeper to take care of them; and in *Merrill v. Sawyer*, 27 Mass. (8 Pick.) 397, that hay in a barn was duly attached, by putting a notification of the attachment on the barn door.

Now, in all these cases, the court went on the principle that the actual possession and custody was necessary to constitute an attachment; although there being no race for priority of attachment, they held that to be the actual custody and possession which, perhaps, was constructive possession only.

The analogous cases all demonstrate the necessity of actually taking the property. This is the established law concerning the levy of executions; that is, the property levied on is actually taken into the custody of law. So when an attachment or execution is levied on the body, it is effected, by a corporal seizing or touching of the body, and thus putting it in the custody of the law (3 Bla. Comm. 288); or by what is tantamount, a power of taking possession and the party's submission thereto.

Gennet v. Sparkes, 1 Salk. 79. *Horner v. Battyn*, Buller on Nisi Prius, 62. But if the person do not submit (and this dead property cannot do) the body must actually be seized.

2. The question now arises, in view of the preceding facts and principles, whether the charge to the jury was correct.

That the plaintiff was at the door of the carriage-house, with a writ of attachment in his hand, only proves his intention to attach. To this no accession is made, by the lawful possession of the key and the unlocking of the door. Suppose, what does not appear, that the key was delivered to him by the owner of the barouche that he might attach the property; this would be of no amount. He might have the constructive possession, which, on a sale as between vendor and vendee, would be sufficient; [*336] but an attachment can only be made by the taking of actual possession. As little importance is attached to the unlocking of the door, and the declaration that the plaintiff attached the carriage. This was not the touching of the property, or the taking of the actual possession. The removal of an obstacle from the way of attaching, as the opening of the door, is not an attachment, nor was the verbal declaration. An attachment is an act done; and not a mere oral annunciation. From these various acts, taken separately or conjointly, the plaintiff did not obtain the possession and custody of the barouche, and therefore, he did not attach the property.

On the contrary, if the facts contended for, by the defendant, were proved, his defence was complete. Between two officers having separate attachments, there was a race for priority. They both had arrived at the carriage-house; and so soon as the door was opened, the defendant outstripped his competitor, and seized on the barouche. By this act, he had the actual possession, and was successful in his intended prior attachment. I would therefore advise a new trial of the cause.

Daggett and Williams, JJ., were of the same opinion. *Peters, J.*, was also inclined to concur, though he was not quite satisfied that the charge was wrong. *Bissell, J.*, was absent.

New trial to be granted.

FIELD v. MACULLAR.
20 Illinois App. 392. (1886)

Second Execution—Necessity of Formal Levy—Necessity of Indorsement—Rule of Priority—Creditor's Right to Follow the Proceeds into the Hands of a Prior Creditor Whose Lien has Failed.

Bill in chancery by Addison Macullar *et al.*, partners, against Peter W. Field *et al.*, partners, and Eric E. Anderson, to recover money received by Field *et al.* arising from execution sale of property of said Anderson. From decree for complainants defendants bring error. Affirmed.

Field *et al.* recovered judgment against Anderson and the same day had execution issued and the sheriff immediately levied it on Anderson's stock of goods and store fixtures. Macullar *et al.* recovered judgment the next day (Oct. 4, '79), and immediately had execution thereon placed in the hands of said sheriff, who promised to levy it but made no indorsement on the writ. Anderson then moved (Oct. 11th) to vacate the Field judgment, but the sheriff proceeded to sale of the property (Oct. 13th), and against protests by attorney for Macullar *et al.* that the Field judgment was fraudulent, and as to them invalid, paid the proceeds to Field *et al.* in part satisfaction of their judgment and returned the Macullar execution wholly unsatisfied. After said sale and payment the Field judgment was reversed by this court and the case remanded for a new trial. After this Macullar *et al.* demanded said money from Field *et al.*, and payment being refused filed this bill.

Lyman & Jackson, for complainants.

James H. Fairchild, for defendants.

The Court by Bailey, J. * * * The principal question in the case is, whether the complainants obtained, by means of their execution, a first and paramount lien on the goods of Anderson levied upon by the sheriff, and upon the proceeds of said goods after the sale. That said execution became a lien on said property from the time of its delivery to the sheriff, is indisputable. * * *

It is not material that there was no formal levy of the complainant's execution. The sheriff had in his hands a former execution against Anderson, apparently valid, in favor of the defend-

ants, and by virtue of that execution he had levied upon said property and taken the same into his possession. In *Leach v. Pine*, 41 Ill. 65, it was held that where a sheriff has in his hands an execution, and levies upon personal property and reduces it to possession, it is then in the custody of the law, and it is not essential to the lien of other executions in his hands or subsequently received, that they should be formally levied; that the execution first coming to hand authorizes the seizure of the property, which creates the levy, and while it remains in his possession he is unable to seize it again.

Upon the execution sale the liens of the two executions immediately attached to the fund created by the sale, with the same rights to priority which existed before the property was sold. See *Hart v. Wingart*, 83 Ill. 282, and authorities cited. It can not be doubted that the effect of the reversal of the defendants' judgment was to extinguish their lien. If the property had remained up to that time in the hands of the sheriff, it could not afterward have been sold under their execution. The property having been sold and the proceeds having been paid over to them, they were no longer entitled, [*396] as against Anderson, to retain the money, but as between them, it was defendants' duty to repay it to him, and he could have recovered it in an action for money had and received. *Clark v. Pinney*, 6 Cow. (N. Y.) 298; *Maghee v. Kellogg*, 24 Wend. (N. Y.) 32; *Green v. Stone*, 1 Harris & John. (Md.) 405; *Freeman on Executions*, § 346, and authorities cited.

The defendants' lien, then, having been extinguished by the reversal of their judgment, and the complainants' lien having remained in full force, the complainants' right to the fund produced by the sale became paramount, entitling them to have the whole of said fund paid to them in satisfaction of their judgment. Said fund belonged to them, and the defendants having obtained possession of it with notice of the complainants' rights, are properly charged as trustees, holding said fund for the benefit of the complainants. We are of the opinion that there was no error in the decree, and it will therefore be affirmed.

Decree affirmed.

The only proper practice is to indorse the levy on the writ or on some paper annexed thereto, and in an action against a sheriff for misappropriating money made on plaintiff's *fi. fa.* the supreme court of Pennsylvania held that the sheriff should not be permitted in defense to show that he had levied upon and sold the property on a previous writ which had no levy indorsed on it, nor to put in evidence a written levy never attached to such writ and not returned with it but retained in the possession of the sheriff till the trial of the action against him. *M'Clelland v. Slingluff*, 7 W. & S. 134, 42 Am. Dec. 224.

Assumpsit by the first attaching creditor against the second, to whom the proceeds were paid by the sheriff on a sale pending an appeal by the first creditor from an order dismissing his attachment, was sustained in Virginia. *Caperton v. McCorkle*, 5 Grattan 177. A similar action was recently sustained in New York, *Gillig v. Grant*, 23 App. Div. 596, 49 N. Y. Sup. 78; *Haebler v. Myers*, 132 N. Y. 363.

10. THE NATURE OF THE LIENS ACQUIRED BY ATTACHMENTS, GARNISHMENTS, JUDGMENTS, AND EXECUTIONS.

Under this head read again: *Allen v. Hall*, ante, 140; *Parsons v. Gill*, ante, 189; *Clark v. Withers*, ante, 191; *Yazoo & M. V. Ry. Co. v. Fulton*, ante, 202; *Commonwealth v. Magee*, ante, 307; all the cases from page 328 to 352; *Hagan v. Lucas*, ante, 418; and *Field v. Macullar*, ante, 432.

Year-books, 2 Henry IV., page 14, No. 5. (A. D. 1401)

Lien of Execution—Bona Fide Purchase.

A question was moved before the justices of the common bench, as to the effect of a judgment on a contract of guaranty, which the plaintiff had recovered *pro loco et tempore*. And it was moved that such guaranty was only a covenant, and that by such covenant a man does not bind any lands he afterward delivers for value in whose hands soever they come by purchase or otherwise without judgment in any action, for that would be too great a mischief. *Brenchesley*—In an action of debt a man shall not have execution of any lands but of those which the defendant had on the day of the judgment rendered, and not of those lands which he sold while the suit was pending. And of chattels a

man shall have execution only of those which the defendant had the day of execution sued. And this was resolved by the whole court.

Translated by the editor. The original is in black-letter Norman-French.

ANONYMOUS.

Croke Eliz. 174. (Hilary term, 31 Eliz.; A. D. 1589)

Decided in the common bench, Anderson, C. J., Periam, Wyndham, and Walmsley, JJ.

Cooper desired the opinion of the court, that if a *fiери facias* be directed to make execution of goods, and after the *teste* of the writ, and before the sheriff executes it, the party sells the goods *bona fide*, if they can now be taken in execution. *The Court* held they might, for by the award of execution, the goods were bound, so that they may be taken in execution, into whose hands soever they come. And Walmsley said so it was ruled in a case at Hertford term, wherein he was of counsel.

SIR GERARD FLEETWOOD'S CASE.

8 Coke's Reports 171. (Paschae, 8 James; A. D. 1611)

Commencement of Execution Lien at Common Law.

Sir William Fleetwood, *anno* 35 Eliz., was possessed of a house and certain lands in Pynner, in the parish of Harrow, in the county of Middlesex, for certain years yet enduring; and *An.* 36 El. he became receiver general of the revenue of the court of wards, &c., and entered into 20 bonds, each of them 200*l.*, with condition to make a yearly perfect account before the 20th of June, &c.; and afterwards upon several accounts, in the years 36, 37, 38 and 39 Eliz. he became indebted to the queen in great sums of money; and he being so indebted, by his indenture, 10 Feb. 40 Eliz., in consideration of 1100*l.* bargained and sold the said lease to James Pemberton, by force whereof he entered, and was thereof possessed; which, by mean conveyance, and in consideration of 1300*l.*, was sold to Sir Gerard Fleetwood. The question was, whether the said messuage and lands are now extendable, or liable to the king's debt? And although it is at the election of the sheriff, either to extend or to sell a lease, so long as it remains in the debtor's hands, as appears in the books of 31 Ass., p. 6; 38

Ass., p. 4; 44 E. An. 3, 16; 7 H., 6, 2., &c., yet it was resolved, that the said sale of the term should bind the king, because the term was but a chattel, and there was no covin in the case, and a sale *bona fide* of chattels is good after judgment, but not after execution awarded, as appears in 2 H., 4, 14, *per Curiam*; 9 H., 6, 58; 11 H., 4, 7, and of the freehold or inheritance which he has at the time of the judgment in case of a common person, and from the time one becomes the king's debtor, 5 Eliz. Dyer 224, 225, Sir Will. Cavendish's case. And the case in 50 Ass., p. 4, was urged to the contrary, where the king's debtor took a lease to him and his wife for years, and before execution the husband died, execution was sued against the wife, for it was the act of the husband, and he had power of the term at the time of his death and the wife came to it without valuable consideration, and *quodammodo* continued the interest of her husband. And Coke, C. J., said, that a receiver, or other accountant who is indebted, shall not be in a worse case than a felon or traitor, who may, after the felony or treason, and before conviction, sell *bona fide* for his sustenance, &c., his chattels, be they real or personal.

WOODS v. MAINS.

1 G. Greene (Iowa) 275. (1848)

Judgment Liens—After Acquired Land—Retrospective Laws.

This is an action of right by Woods against Mains in the Des Moines district court, to recover several tracts of land in that county. From judgment for the defendant on plea and verdict denying the right plaintiff brings error. Reversed.

Plaintiff supported his claim to title by a judgment rendered in the Des Moines district court, June 19, 1838, and a sale of the lands to his grantor, May 10, 1845, under an *alias fi. fa.* on that judgment (Duer v. English); and showed that the defendant therein, English, acquired title from the United States government by patent dated Oct. 28, 1839. Plaintiff claimed that Duer's judgment became a lien on that land by virtue of the statute approved Jan. 20, 1840; and that thereby his execution overreached the defendant's title, which is based on a deed from English dated and executed April 20, 1840. The court instructed the

jury to find a verdict for the defendant, because the plaintiff had shown no subsisting interest.

Grimes, H. W. Starr and L. D. Stockton for plaintiff.

D. Rorer for defendant.

Kinney, J. * * * In approaching the various important questions presented by the bill of exceptions, and raised by counsel in this case, we do it with great diffidence. But we have been materially aided in coming to a conclusion satisfactory to a majority of the court, by the great ability with which the important principles applicable to judgment liens, the sale and transfer of real property, and the construction of statutes, have been discussed by the respective counsel.

The instructions of the court, as set out in the bill of exceptions, raise three important questions:

1. The doctrine of liens, and to what extent, at common law, judgments were liens.

2. The construction and effect of the statute of frauds of Iowa of 1840, and its applicability to the judgment against English.

3. Whether a judgment can bind lands purchased and acquired by the judgment-debtor posterior to the rendition of the judgment against him.

It is contended, with great apparent confidence, by the counsel for the defendant in error, that neither at common law nor by our statute, was it enacted at the time of the rendition of [*291] the judgment, nor at the time the land was sold on execution, that the judgment was not a lien upon the lands purchased by Mains of English and wife. It is also urged with great ability that the statute of frauds of 1840 could not affect the judgment against English, as the judgment was rendered anterior to the passage of that statute; and to give it such effect would be not only to make it retrospective in its action, but that it would also thereby become a lien upon lands purchased by the judgment-debtor subsequent to the rendition of the judgment.

At an early day, in England, as has been correctly said by counsel, judgments could not be collected by sale of the lands as they were exempt upon feudal principles. The statute of

West., 2, creating the writ of *elegit*, by which the possession of one-half of the land was sold, was enacted; and the courts held that, although the statute did not create a lien, yet from the power of the court to enforce the collection of its judgments, it was a lien upon so much as was within the scope of the writ to execute and sell.

In the absence of statutory enactments at a later period, both in England and in this country, it has been held that judgments were liens upon lands. 2 Tidd. Pr. 967.

In the language of Chief Justice Marshall, courts have inferred a lien from the power to take lands on execution. [*Scriba v. Deanes*], 1 Brock., 170 [Fed. Cas. No. 12,559]. This doctrine appears to have grown out of the nature and properties of the judgment itself, and the execution to enforce its collection, and its utter imbecility without so essential a quality. This principle seems to have been so universally recognized by the courts in England and this country, that it became ingrafted into, and formed a part of the common law of the land.

Since the statute of frauds of West., 2, creating the writ of *elegit*, and the various acts of parliament since that statute, and the apparent necessity of statutory provisions in this country, most of the states of the union have passed statutes upon the [*292] subject of liens, with provisions peculiar to the statutes of the respective states.

At the time the judgment was rendered against English, the Michigan code was in force: Iowa then forming a part of, and being under the jurisdiction of Wisconsin. By the provisions of that code, all lands and tenements, as well as the goods of the debtor, were bound from the time they were seized in execution. Mich. Code, p. 424, §2.

Iowa assumed a territorial form of government in July, 1838. On the 25th day of January, 1839, the territorial legislature passed an act subjecting real and personal estate to execution. Laws of 1839, p. 197. This act subjected real and personal estate to be levied and sold upon execution.

Neither in the Michigan code nor in this statute is there any express provision making judgments in the district and supreme

courts liens. Judgments then, at common law, under the writ of *elegit*, only being liens inferentially, arising out of the power of the courts to collect them, these statutes did not materially change or alter the common law. But the statute of frauds of 1840 enlarged the common law by directly making judgments liens.

This statute provides "that judgments in the district and supreme courts of this territory shall have the operation of, and shall be liens upon, the real estate of the person or persons against whom such judgments may be rendered from the day of the rendition thereof, in the county within which such judgments may be rendered."

Does this statute apply to judgments in *esse* at the time it took effect, or relate exclusively to those thereafter to be rendered? If it operates upon then existing judgments, the judgment against English comes within its provisions.

In Swift's Digest the following rules are laid down for the construction of statutes: "The common law is to be regarded, and three things are to be considered—the old law—the mischief—and the remedy: how the old law stood at the time of making the act; what the mischief was for which the common [*292] law did not provide; and what remedy the statute had provided to cure the mischief." By the aid of these rules, we have but little difficulty in placing a construction upon this statute satisfactory to a majority of the court.

The writ of *elegit* in England, and of *feri facias* in this country, seized the property, but the judgments upon which they issued were only liens by virtue of the power of the courts to enforce the collection of their judgments.

The Michigan code, and the law of 1839, being silent in relation to liens, the common law remained undisturbed. What then was the mischief to be remedied? and what was the remedy provided by the statute of 1840?

At the time this statute was passed we had just entered upon our territorial existence. Iowa was assuming a business and commercial importance, commensurate with the great and growing enterprise peculiar to the west.

The government lands were brought into a market, and the

people for the first time were becoming the fee-simple owners of the soil. Judgments had been rendered in the district and supreme courts of the territory, at a time when there were not any lands on which they could be liens, the title being in the general government.

These judgments, as against real estate of the judgment debtors, having been obtained when they did not, and could not, possess any title to lands, were in many instances nugatory, and comparatively void. At common law, nor by statute, up to the statute of 1840, they were not liens upon lands purchased by the debtors, after the land came into market, and hence creditors were almost or quite remediless.

Under this peculiar state of things incident to the early history and settlement of Iowa, of which the court will take judicial notice, was the mischief, and therefore the necessity of providing a remedy by which these judgments should become liens.

Irrespective of the mischief intended to be cured by the statute, and the necessity of a remedy for which the old law did not provide, we would not do violence to the language of the [*294] statute, by giving it a construction applicable to all judgments unsatisfied at the time it took effect.

Judgments in the district and supreme courts shall be liens upon the real estate of the person or persons against whom such judgments may be rendered, &c. To construe this statute as referring exclusively to judgments *in futuro*, would not only be forced and ungrammatical, but such a construction would defeat the object of the legislature in the remedy intended. If they had so intended it to have operated, it is not unreasonable to presume that they would have used the words, judgments hereafter rendered in the district court &c., instead of using language which applies as well to judgments *in esse* at the time, as future judgments.

The judgment against English was in full life and force at the time this statute took effect. English at that time was also owner of the land in controversy. The land was in the county where the judgment was rendered; as such we think the judgment clearly became a lien, by virtue and force of the statute.

In adopting this construction, and coming to this conclusion, we nevertheless cannot recognize as sound law, that judgments will bind after-acquired land. * * * [*295]

It has been urged to the court, with much force, by the counsel for the defendant in error, that, as the judgment was [*296] rendered against English antecedent to our change into a territorial government, the statute could not affect it; that it could only affect such as were rendered in the district and supreme courts of Iowa. We do not think this position well taken. Section 15th, of the organic law, enacts, "that all suits, process, proceedings, &c., shall be transferred to the district courts established in Iowa." * * *

Judgment is therefore reversed, and a new trial awarded.

[*297]

Dissenting opinion by Hastings, C. J. While I concur with the majority of the court in the main points settled in this case, I find myself arriving at a very different conclusion.

The judgment against English was rendered in the year 1838, a period when there was little of any real estate within the present boundary limits of this state owned in fee by the people who then inhabited it.

The first, and I think the most important question to be settled is, whether the judgment against English attached to, as a lien, after-acquired lands. Under the laws then in force, the plaintiff had a right to his execution against the real and personal estate of the defendant. There was no statute then in force, that has been brought to our notice, which gave the judgment creditor a lien upon the real estate of the defendant, without execution and levy; and no law giving a judgment the property of binding the estate of the defendant, but the common law, modified by the acts of parliament of Great Britain.

By the common law of England, judgments did not attach on real estate, on account, it is supposed, of the feudal tenures by which all the real estate in England was holden at one time. In proportion as the feudal system gave way to the more enlightened and liberal spirit of the age, creditors, who always had a controlling influence, succeeded in procuring the enactment of

the Statute of Westminster 2d, 13, Ed. I., c. 18, which gave the creditors the possession of one moiety of the debtor's lands, which he had at the time of the judgment rendered. Because the parliament had put this power into the hands of the creditors, the court of common law immediately erected thereon judgment liens, under pretense that the doctrine originated from the power to take the lands in execution. The lien is said to grow out of the right to issue the *elegit*. *Scriba v. Deanes*, 1 Brock., 170 [Fed. Cas. No. 12,559].

I can see no reason for such an inference; it appears to be an unauthorized, arbitrary rule, which no court ever should have adopted—a violation it appears to me of all correct rules [*298] of construction of statutes, adding to an act of parliament, without authority, a power to make judgments bind real estate in the hands of innocent *bona fide* purchasers without notice. By the same arbitrary decisions, the lien is made to retroact, and exist days before the judgment is rendered; and the lien would probably have yet existed, but for the interference of the 16th section of the English Statute of Frauds, 29th Charles II., chap. 3, which provided that such liens, as against purchasers, *bona fide*, for valuable consideration, should be limited to the day judgment was signed. Thus did this doctrine originate; and having been impliedly sanctioned by subsequent acts of parliament, and especially the last act mentioned, and having been universally conceded to exist ever since, and coming with our ancestors to this country, and being engrafted upon our systems of jurisprudence as a part of the common law, it would seem to be rash, if not unwise, to question this right of lien wherever the English common law prevails; or that the right to seize lands of a defendant, on execution, exists either by *elegit* or other final process. If there had been no statute in force regulating writs of execution at the time of the rendition of this judgment, I should agree with the court below in limiting the lien; but there were statutes providing for the sale of defendant's land, imparting to the purchaser the title in fee. The *elegit* did not exist, but a more powerful process was substituted; the lien did not depart with the *elegit*, but was extended with the writ of execution to the title in fee of all the lands

of defendant. The same reason which caused the origin of this lien, will extend its power from a moiety of the lands of defendant to the entire real estate liable to execution. The judgment, then, at the day of the rendition thereof, possessed the property of binding all the real estate of English, owned in fee, within the jurisdiction of the court which rendered it.

It is argued by plaintiff in error, with much ability, and apparently supported by high judicial authority, that this judgment bound the estate of English, subsequently acquired, and consequently attached to the premises in controversy. Inasmuch [*299] as the plaintiff had his right to execution on lands subsequently acquired, and as the lien originated in the right to issue the *elegit* in the first place, so it is contended it extended to, and attached upon, the right to execution on subsequently acquired estate. If the decisions creating a lien, in the first place, were founded in reason, it would be but reasonable that the lien should be thus extended; but as this decision was arbitrary, and engrafted as law upon an act of parliament under mere pretence of construing the meaning and giving effect to the same, and as some of the American courts have repudiated this doctrine, and as much confusion appears to exist in the English cases as to the right of this lien, and as there appears to be no sound reason in making such extension of the lien in this country, I concur with the majority of the court in the opinion, that judgments do not attach as liens upon the real estate of the defendant, acquired after its rendition. Sugden, in his treatise on vendors, admits "that it was usual to search for judgments against a vendor only from the time he purchased the estate," Sugden on Vendors, 340. But he condemns the practice, and refers to cases which Yeates, J., in *Calhoun v. Snider*, 6 Bin. (Pa.) 138, says, "will not warrant the doctrine to the extent laid down by that author."

In the case cited, 4 Ohio, 94, the court says, "no adjudged case can be found in the English books, so far as opportunity has been allowed for examination upon the question, whether lands acquired subsequent to the judgment, and conveyed before the execution issues, are liable to inquisition under the *elegit*;" and adds that the supreme court of Pennsylvania have traced the

authority to the year-books, and concludes it is not settled by any of them.

We ought not, then, to gratify the rapacity of judgment creditors, by establishing a lien which has been of doubtful existence in a country in which the most favored debtors in failing circumstances were but prisoners at large. I believe this question has been several times before the supreme court of the territory, and this lien was by that court unhesitatingly [*300] repudiated; and such has been the fate of this question in the district courts of the territory in which I have practised, from the first organization of these courts. * * * [*301]

I cannot, therefore, agree with the majority in their construction of this act, nor in their conclusion, that the court below erred in charging the jury that the plaintiff in this case has not shown that in law he has any valid, subsisting interest in the land described in his declaration.

Statute 29 Charles II, Chapter 3, §§ 13, 14, 15 and 16.—A. D., 1677. (Original § 13, cited as §§ 13 and 14.) And whereas it hath beene found mischievous that Judgements in the Kings Courts at Westminster doe many times relate to the first day of the Terme whereof they are entred or to the day of the Returne of the Originall or fileing the Baile and binde the Defendants Lands from that time although in trueth they were acknowledged or suffered and signed in the Vacation time after the said Terme whereby many times Purchasers finde themselves agrieved [§ 14.] Bee it enacted by the authoritie aforesaid That from and after the said foure and twentyeth day of June any Judge or Officer of any of his Majestyes Courts of Westminster that shall signe any Judgements shall at the signeing of the same without Fee for doeing the same sett downe the day of the moneth and yeare of his soe doeing upon the Paper Booke Dockett or Record which he shall signe which day of the moneth and yeare shall be alsoe entred upon the Margent of the Roll of the Record where the said Judgement shall be entred.

(Original § 14 cited as § 15.) And bee it enacted That such Judgements as against Purchasers bona fide for valueable consideration of Land Tenements or Hereditaments to be charged thereby shall in consideration of Law be Judgements onely from such time as they shall be soe signed and shall not relate to the first day of the Terme whereof they are entred or the day of the Returne of the Originall or fileing the Baile Any Law, Usage or Course of any Court to the contrary notwithstanding.

(Original § 15 cited as § 16.) And bee it further enacted by the authoritie aforesaid That from and after the said fower and twentyeth day of June noe Writt of Fieri facias or other Writt of Execution shall

binde the Property of the Goods against whome such Writt of Execution is sued forth but from the time that such Writt shall be delivered to the Sheriffe Under Sheriffe or Coroners to be executed, And for the better manifestation of the said time the Sheriffe Under-Sheriffe and Coroners their Deputyes and Agents shall upon the receipt of any such Writt (without Fee for doeing the same) endorse upon the backe thereof the day of the moneth [or ¹] yeare whereon he or they received the same.

Explanation.—The above are §§ 13, 14 and 15, of the statute as they appear in the "Statutes of the Realm" Vol. 5 p. 841, published in London in 1819, "printed by command of His Majescy King George the Third," etc. Shortly after the statute was enacted some careless scribe divided § 13 numbering the last part of it § 14 and all the succeeding sections one number greater than each bears in the original statute. This blunder has been copied by all the succeeding unauthorized editions of the statute, and §§ 14 and 15 are always cited as §§ 15 and 16 and the same is true of all that follow. See Throop on Verbal Agreements, p. 30. In the Statutes of the Realm the section numbers are in the margin in Roman numerals. I have inserted in § 13, at the place where the division was made, [§ 14] that the student may note the part which is cited as § 14. The [or 1] in the last section is as it appears in the Statutes of the Realm, which is explained at the foot of the page by the note: "and" O. omitted.

SMALLCOMB v. CROSS AND BUCKINGHAM.

1 Lord Raymond 251, 1 Comyns 35, 1 Salk. 320. (9 Will. III. A.D. 1697)

**Who Entitled to First Levy—Common Law Rule—29 Car. II. Rule—
Levy and Sale by Sheriff under Last Writ—First
Creditor's Right to Retake Property.**

This decision, rendered by the English Court of Common Pleas, Holt, C.J., Rokeby, Turton and Eyer, JJ., is given according to the report by Lord Raymond. The reporters do not disagree as to the material facts, but the other reports give them more in detail.

In *trover* for goods, upon the general issue pleaded, at the trial at *nisi prius* in London at Guildhall, before *Holt*, chief justice, the fact appeared to be thus: *J. S.* recovered judgment in debt against *Fox*, and *J. N.* recovered another judgment against *Fox*. *J. S.* sued a *fiery facias* upon his judgment, which was delivered to the sheriffs of London at nine o'clock in the morning, but he would not take a warrant of the sheriff to levy the goods, but procured the writ to be indorsed according to the statute of 29 Car. 2. cap. 3. *J. N.* sued another *fiery facias*, which bore *teste* before the *fiery facias* of *J. S.* but was delivered to the sheriffs sub-

sequent to the *feri facias* of *J. S.*, viz. at ten o'clock in the morning, but both the writs were delivered the same day. *J. N.* took a warrant from the sheriffs, and levied the goods in execution, which the sheriffs sold to the plaintiff *Smallcomb*. Afterwards the sheriff seized the goods in [*252] execution upon the *feri facias* of *J. S.* and sold them to the defendant *Cross*. And now *Smallcomb* brought *trover* against *Cross* and the sheriffs of London; and this matter appearing upon the evidence, *Holt*, chief justice, doubting of it, appointed that it should be moved in court. And after argument on both sides it was resolved by the judges that if two writs of execution are delivered to the sheriff the same day, he has not an election to execute which he pleases, but he must execute that which was first delivered. But if the sheriff levies goods in execution by virtue of the writ last delivered, and makes sale of them (whether the last writ was delivered upon the same day or a subsequent day) the property of the goods is bound by the sale, and the party cannot seize them by virtue of his execution first delivered; but he may have his remedy against the sheriff. For sales made by the sheriff ought not to be defeated, for if they are, no man will buy goods levied upon a writ of execution. And at common law if a *feri facias* had been sued the first day of the term, and another *feri facias* afterwards, and the last had been first executed, the other had had no remedy but against the sheriff. But in this case no action lies against the sheriff, because he who delivered his writ first would not take a warrant from the sheriffs to levy the goods; so that it seems he had a design only to keep the execution in his pocket, to protect the defendant's goods by fraud. *And judgment for the plaintiff by the whole court.* * * *

This is a leading case and figures prominently in all discussions of this and kindred questions. It is universally recognized as good law. See *Payne v. Drewe*, ante, 338.

In trespass *de bonis asportatis* by a purchaser at a constable's sale against a sheriff who took the property from him on a *fi. fa.* against the original judgment debtor in his hands before but not levied till after the levy and sale by the constable judgment was rendered for plaintiff and affirmed on appeal. *Duncan v. M'Comber*, 10 Watts, (Pa.) 212. *Marsh v. Lawrence*, 4 Cowen (N. Y.) 461, is a similar case.

A sheriff having levied three *fi. fas.* on a horse brought *trover* for

it against one claiming as purchaser at a sale by a constable on a warrant issued by a justice of the peace and received and levied by the constable after the sheriff received but before he levied his writs. Judgment for defendant was affirmed on appeal, *Smallcomb v. Cross*, and *Payne v. Drewe*, being cited with other decisions as authority. *Jones v. Judkins*, 4 Dev. & Bat. (N. Car.) 454.

The doctrine of *Smallcomb v. Cross* applies only to chattels, for if the judgment is a lien the record of it is notice to everyone and the land may be sold on execution to satisfy it though previously sold under an earlier writ on a junior judgment. *Kirk v. Vonberg*, 34 Ill. 440.

GREEN v. JOHNSON.

9 North Carolina (2 Hawks) 309, 11 Am. Dec. 763. (1823)

Executions—Priority at Common Law—Lien from Teste.

Motion in the *superior* court of Warren by Green for a rule to Johnson, to show cause why money raised by him by sale of land should not be applied in satisfaction of Green's execution on his judgment in said court rendered at October term, 1821, against one Hawkins, whereon a *fi. fa.*, tested of that term, issued March 15th, 1822, and delivered to Johnson, as county coroner, to be executed. From an order discharging the rule Green appeals. Reversed.

At the February term of the Warren *county* court judgments were rendered against Hawkins, and executions issued thereon and delivered to Johnson before he received Green's *fi. fa.* Afterward he sold Hawkins's land on the executions from the county court, and now has the money.

Taylor, C. J. My enquiries, in this case, have led me to the belief, that the plaintiff is entitled by law, to the money in the hands of the sheriff, by virtue of the prior *teste* of his execution. I do not mean to give an opinion on any other facts than those stated on the record; nor, particularly, on the supposition that the money had been raised by a sale under the second execution.

The writ of *fi. fa.* in this state, binds the defendant's goods from the *teste* of the writ, after which time, any sale of them is void; because, from thence the goods are attendant to answer the execution. This is an old rule of the common law, founded on the reason, that as executions could issue only against goods which might, if not so bound, be sold by the party, he would thus

be able to evade what is termed the life of the law, its effect and fruit. The common law, also, presumed that the sheriff would execute such writs immediately, and thereby give such publicity to the transaction as would prevent imposition upon purchasers. The judgment did not bind, because that being in force for a year, it would have been vexatious to restrain the debtor from his ordinary private dealings for so long a period.

When the term *lien* is applied to other subjects in the law, its import is familiarly understood to be a binding, or attachment, of the thing spoken of, for the benefit of him who is entitled thereto. The lien of a vendor on goods not yet delivered, of a carrier, a factor, or pawnbroker, entitles them, respectively, to a priority over others, whose claims are posterior, upon the simple rule of justice, that the first lien gives a right to the first satisfaction. [*311]

So far from there being any reason wherefore this rule should not be applied, and enforced to a certain extent between the conflicting claims of creditors under different executions, it seems to me demonstrable, from a slight view of the alteration of the law by the statute of frauds, that it is so applied, and always has been.

When that statute was passed, the priority arising from the *teste* was understood to subsist in theory in full vigor: every book that treated on executions, laid it down as settled law; and the statute itself had no further view, than to restore its practical utility by the substitution of a lien better fitted, by its notoriety, to prevent fraud and injustice to third persons.

It was not that the rule of the common law was defective, in fixing on the *teste* of an execution to bind the defendant's goods; because, in reality, the law supposed the execution to be delivered to the sheriff immediately from the *teste*; and if, in point of fact, that had been done, the purposes of the statute would have been accomplished, and its enactment rendered useless. Thus the *award* of an execution, and the *teste* of an execution, are convertible terms; but the former is chiefly used in cases before the statute. A *bona fide* sale of chattels is good after judgment, but not after execution awarded, *Sir Gerard Fleetwood's Case*, 8 Coke

170. "By the *award* of execution the goods are bound, so that they may be taken in execution, into whose hands soever they come." Cro. Eliz. 174.

But the real mischief intended to be remedied was, that creditors took out executions, one under the other, without delivering them to the sheriff, whence the retrospect of the *teste* made sales uncertain, each plaintiff being entitled, according to his relative priority; and it was utterly impossible for purchasers and strangers to tell, without an inspection of the record, a process neither cheap nor easy, to what extent the goods were bound. [*312]

So far as other persons were concerned who might have a title to the goods between the *teste* and delivery, the statute designed to restore the old law; but as to the party himself, his executors and administrators, the goods, since the statute, as before, are bound from the *teste*. 2 Show. 485.

If this position be correct, I would infer from it this corollary, that the cases, since the statute of frauds, showing the force and extent of the lien created by the delivery of the writ of *fi. fa.*, will go very far towards explaining and proving the extent and operation of the lien arising from the *teste* before the statute. A more direct mode of showing the question would be, to adduce cases which occurred before the statute; but none such, directly in point, are to be found. There are, however, *dicta* and decisions of modern judges, relative to the common law in this point, which, if correctly reported, are entitled to much consideration. Lord Mansfield decided, that, though the sheriff had seized under one writ first, he was bound to sell under another delivered afterwards, if it had a prior *teste*—cited in 4 East 534, *in notis*. To the same effect, is the opinion of the late Chief Baron MacDonald, who having presided many years in the court of exchequer, may be supposed, was well instructed on the subject. His words are, "I take it, before the statute of frauds, a writ of execution of a prior *teste*, would have been preferred to a writ of execution of a subsequent *teste*, although the latter was first delivered to the sheriff, and was begun to be executed, provided that the writ of prior *teste* came to the sheriff's hands before sale"—cited in 16 East 279, *in notis*. If these opinions of these eminent men

are to be relied on as authentic, they go the whole length of the present controversy. They will be found, too, in accordance with the decisions since the statute.

The case of *Hutchinson v. Johnson*, 1 Term Rep. 729, shows, that where two writs of *fi. fa.* against the same [*313] defendant are delivered to the sheriff on different days, and no sale is actually made of the defendant's goods, the first execution shall have the priority, even though the seizure was first made under the subsequent execution. I would remark on this case, that the statute priority by delivery, is preserved, notwithstanding a seizure under a second delivery. Can any reason be assigned, why the common law priority shall not be maintained, notwithstanding a seizure under a subsequent *teste*, provided the first execution reaches the sheriff before the last is actually executed? If there cannot, then the case before us is decided by this authority. * * * The law laid down in the case, affirms every principle on which the plaintiff relies in the case before us, though it goes further, and validates a sale made under the second execution, a question with which we have now no concern. *Rybot v. Peckham*, cited in 1 Term Rep. 729, is decided on the same principle; and while it admits the validity of a sale under the second execution, it shows at the same time, that the sheriff makes himself liable to the plaintiff in the first, which could not be, but for the priority of the latter. The courts have evidently gone [*314] far to support sales actually made under execution; and it is probably right, and according to the general policy of the laws, that innocent vendees should not be disturbed by dormant liens, more especially as the plaintiff may obtain satisfaction from the sheriff: but though a second execution *executed* may destroy the lien of the first; though it may be waived, or lost by laches or fraud, or overreached by relation of a bankruptcy or extent, yet nothing of that kind appears in this case. I am, therefore, of opinion that judgment shall be entered for the plaintiff. * * * [*318]

If an execution of prior *teste* is held up by the party, or not issued, which is the same thing, and one of posterior *teste* issues, and is *executed*, there is no injustice in saying that the latter shall have the preference; *vigilantibus et non dormientibus leges sub-*

veniunt. But when an execution of younger date happens, by mere accident, to reach the hands of the sheriff before one of an older teste, and is not executed before the other is received by the sheriff, I can see no injustice or inconvenience in giving a preference to the execution bearing the first or oldest teste, *qui prior est tempore potior est jure.* * * *

Henderson, Judge, dissentiate. This case is submitted without argument, and I fear I have not been able to find all the cases on the subject, or duly to understand and appreciate those I have found. The result of my investigation is, that neither at the common law nor since the statute of frauds, did either the *teste* or the delivery of the writ of execution bind or fix upon the property, otherwise than to affect it in the hands of a voluntary purchaser; that as between the debtor and the creditor, the property was not divested by either; and that at the common law, the first delivered writ of execution [*319] imposed upon the sheriff an obligation of executing it, before writs subsequently delivered, upon this simple ground, that he who is prior in point of time, has a prior claim to his exertions over those who are posterior, upon the maxim, *vigilantibus non dormientibus servat lex.* * * *

KENNON v. FICKLIN AND PECK.

44 Kentucky (6 B. Monroe) 414, 44 Am. Dec. 776. (1846)

Priority between Attaching Creditors—From Delivery—Several Deputies of Same Sheriff.

Hord, for plaintiff.

Beatty, for defendants.

The Court by Ewing, C. J. This is a controversy between attaching creditors, as to the distribution of the fund attached, their cases against an insolvent debtor and garnishees who owed him being all heard together. It seems that Kennon's bill was first filed, and his process first placed in the hands of one deputy; that afterwards, on the same day, Ficklin and Peck, each with a knowledge of the fact, and with a view to overreach the claim of Kennon, filed their separate bills, sued out process, and placed the same in the hands of another deputy, who executed the same first, each deputy using reasonable diligence in the execution of the process put into each of their hands.

Upon the hearing of all the cases together, the court gave priority to Ficklin and Peck, decreeing to them the fund due from the garnishee, upon the ground that process was first served on them in the cases of Peck and Ficklin. [*415]

While it is conceded that in the case of distinct officers, the first levy gives the prior lien, yet in the case of the same officer, in the discharge of impartial justice between litigants, it is his duty and that of his deputies to levy that first which first came to his or their hands; and if his deputy levies the junior execution first, it is his duty, upon being apprised of the fact, to pay the money to the plaintiff in the senior execution, as was determined by this court in the case of *Million v. Commonwealth, for the use of Withers*, 1 B. Monroe, 310.

Though there is not a perfect analogy between the execution of original process or process of attachment and the levy of an execution, as the officer of sheriff is one, and his deputies his own agents, it is his duty, in the discharge of impartial justice between litigants, to execute and require his deputies to execute all process in the order in which it comes to the hands of either. And the statute, with a view to preserve the time, requires the sheriff to indorse the process the time of its reception. 1 Stat. Law, 339.

The junior process, it is true, where there are several deputies, may be sometimes first served without fault on the part of the principal or either of his deputies, as in the case before us, when the process in one case was placed in the hands of one deputy, and in other cases in the hands of another, the latter not knowing of the prior process in the hands of the former. Each are required to use due diligence in the execution of the process placed in his hands, and in the exercise of all reasonable diligence on the part of both, one may succeed in the execution of his process first. If that should be the junior process, it would be hard to make the principal liable to the plaintiff in the senior process; nor is it just, necessary or proper, in such a case to make him responsible.

The process in all the cases being served, and the fund attached being in the power and under the control of the court, and all the parties before the court, the chancellor should, in the

distribution of the fund, exercise that same impartial justice between the parties, which should have been observed by the officer in the execution of the process. As with him the first come should be first [*416] served, if he or any of his deputies has been seduced, or by trick or stratagem, deluded into the service of the junior first, or if this should happen in the exercise of due diligence on the part of the officers, the chancellor having the control of the fund should distribute it as it would have been distributed had the officer executed them in the order in which they came to hand.

The decree of the circuit court giving priority to Ficklin and Peck, to the demand against Henry and Bett, is reversed, and cause remanded that a decree may be rendered giving the priority and preference to Kennon in the distribution of this fund.

RICHARDS ET AL. v. THE MORRIS CANAL & BANKING CO.
20 New Jersey Law (Spencer) 136. (1843)

Priority between Execution Creditors—Lien form Levy—Proceeds in Court.

Motion by Richards et al. for a rule to amend the sheriff's return to their execution against the above defendant by adding thereto a levy on the property sold by the sheriff under an execution against the defendant in favor of Robt. Thompson, and that the money in court arising from said sale be paid to the plaintiffs. Granted.

Plaintiffs' execution was issued and delivered to the sheriff at the September term, 1841; and he would have levied it but for an order entered the same term, staying proceedings under it to enable the defendant to make a defense against the judgment. That issue has now been resolved in favor of the plaintiffs; but in the meantime the sheriff received Thompson's execution and under it levied and sold property for the \$1724 30 now in dispute.

A. Whitehead and *P. D. Vroom*, for the motion.

O. S. Halsted, contra.

The Court by Hornblower, C. J. It would be the height of injustice to refuse this motion. The property out of which this money was raised was bound by the plaintiffs' execution from the time of its delivery to the sheriff, and he would have levied

upon it if it had not been for the misentry or misconception of the rule granted by the court. The execution was not set aside, nor its legal operation in any way suspended, so as to let in a junior execution. The intention of the court was simply to stay the sheriff from making a sale under it until the rights of the parties had been settled by the court. The execution, therefore, though not actually levied, continued to be a lien upon the property till it was sold; and that lien followed the proceeds of the sale in the hands of the sheriff. The money in court ought, in my opinion, to be paid over to the plaintiffs in satisfaction of their execution as far as it will go.

Ordered accordingly.

Compare *Commonwealth v. Magee*, ante, 307.

PULLIAM v. OSBORNE.

58 United States (17 Howard) 471. (1854)

Execution Lien—Conflict of Jurisdiction—Effect of Levy and Sale under Junior Writ.

Mr. Badger, for plaintiff in error.

No counsel appeared for defendant in error.

The Court by Campbell, J. This was an issue in the district court, under a statute of Alabama (Clay's Digest, 213, §§ 62, 64), for the trial of the [*474] right to property taken under an execution from that court, in favor of the appellee, and claimed by the testator of the appellant, as belonging to him, and not to the defendant in the execution.

It appeared on the trial that, at the delivery of the execution to the marshal, in favor of the appellee, the property belonged to the defendant, and that the levy was made before the return day of the writ; but that, before this levy, the property had been seized and sold to the claimant, by a sheriff in Alabama, under executions issued from the state courts, upon valid judgments, after the *teste* and delivery of the executions from the district court.

The district court instructed the jury, that a sale under a junior execution from the state court did not divest the lien of the execution from the district court, and that the writ might be executed, notwithstanding the seizure and sale under the process from the state court.

The lien of an execution, under the laws of that state, commences from the delivery of the writ to the sheriff, and the lien in the courts of the United States depends upon the delivery of the writ to their officer. But no provision is made by the statute of the state or the United States for the determination of the priorities between the creditors of the respective courts, state and federal. They merely provide for the settlement of the priorities between creditors prosecuting their claims in the same jurisdiction.

The demands of the respective creditors, in the present instance, were reduced to judgments, and the officers of either court were invested with authority to seize the property.

The liens were, consequently, coördinate or equal; and, in such cases, the tribunal which first acquires possession of the property, by the seizure of its officer, may dispose of it so as to vest a title in the purchaser, discharged of the claims of creditors of the same grade.

This court applied this principle (*Williams v. Benedict*, 8 How. 107) to determine between judgment creditors in a court of the United States, and an administrator holding under the orders of a probate court of a state; in *Wiswall v. Sampson*, 14 How. 52, in favor of a receiver holding under the appointment of a court of chancery of a state and a judgment creditor; in *Peale v. Phipps*, 14 How. 368, in favor of a trustee in possession, under the order of a county court, against such a creditor; and in *Hagan v. Lucas*, 10 Pet. 400, between execution creditors issuing from state and federal jurisdictions. The same principle has been applied, in several state courts, in favor of the purchasers at judicial sales of steamboats, and other [*476] crafts subject to liens in the nature of admiralty liens. *Steamboat Rover v. Stiles*, 5 Blackf. (Ind.) 483; *Steamboat Raritan v. Smith*, 10 Mo. 527; *George v. Skeates*, 19 Ala. 738; and is recognized in the courts of common law and admiralty in Great Britain. *Payne v. Drewe*, 4 East. 523; 2 Wms. Ex'rs, 888; *The Saracen*, 9 Eng. Admiralty Rep. 451, 2 W. Rob. 451. * * *

The instruction of the district court is erroneous, and its judgment is therefore

Reversed and cause remanded.

Where the process created a lien from the delivery of it to the officer for execution, an execution was issued on a judgment of a justice of the peace and placed in the hands of a constable. Afterward an attachment was issued from the circuit court in favor of another creditor of the same debtor and given to the sheriff, who immediately seized the debtor's property thereon. The constable then returned his writ: "No goods except in the hands of the sheriff, which he refuses to relinquish." Then the creditor under the justice judgment filed a motion in the circuit court to order the sheriff to pay to him sufficient of the proceeds of the sale of said property to satisfy his execution. The order of the circuit court denying this motion was affirmed on appeal on the authority of *Payne v. Drewe*, *Field v. Milburn*, 3 Mo. 488. See also *Leopold v. Godfrey*, 50 Fed. Rep. 145; *Derrick v. Cole*, 60 Ark. 394, 30 S. W. 760; *McCall v. Tervor*, 4 Blackf. (Ind.) 496; *Milton v. Commonwealth*, 40 Ky. (1 B. Mon.) 310; *Adler v. Roth*, 5 Fed. 895, 2 McCrary 447; *Burnham v. Dickson*, 5 Okl. 112; *Sharpe v. Hunter*, 47 Tenn. (7 Cold.) 389.

In Illinois it was held that a sheriff having a *fi. fa.* in his hands might take property from a constable who had levied on it under a junior distress warrant and that the execution creditor was entitled to be first satisfied out of the proceeds. The decisions are reviewed at length. *Rogers v. Dickey*, 6 Ill. (1 Gilm.) 636; *Hanchett v. Ives*, 133 Ill. 332. See also: *Wells v. Marshall*, 4 Cowan 411. Compare *Lynch v. Hanahan*, 9 Rich. L. (S. Car.) 186; *Charron v. Boswell*, 18 Gratt. (Va.) 216; *Riddle v. Marshal of D. C.*, 1 Cranch C. C. 96, Fed. Cas. No 11808.

REEVES v. SEBERN.

16 Iowa 234, 85 Am. Dec. 513. (1864)

Under Modern American Rule as to When Lien Attaches—Purchasers for Value with Notice—The Three Rules—Comparative Extent to Which Each Prevails.

Action by Reeves & Co. against Sebern. From judgment for plaintiffs defendant appeals. Affirmed.

Plaintiffs, who are creditors of K. & H., claimed the goods in controversy by purchase from K. & H. Defendant, as sheriff, claimed them under a subsequent levy on execution against K. & H. The court below found that the execution was issued and in defendant's hands for service, and that plaintiffs and K. knew it before their purchase was made; also, that the purchase was free from fraud, and that the writ was not levied till nearly a month after the purchase.

C. H. Conklin, for appellant.

J. C. Traer, for appellees.

The Court by Dillon, J. * * * The defendant now claims that the execution, though not levied, was a lien upon the goods and chattels of the debtor. We are aware of no decision in this state fixing the *time* when the goods of an execution defendant are bound, whether from the teste of the writ, or from its delivery to the officer, or from actual levy only. This subject is now settled by statute, which provides that execution shall bind only from the time of levy. Laws 1862, p. 231. This act was not in force at the date of the transaction now in question, and hence it becomes necessary to state what the law was before the act was passed.

At the common law the writ of *fi. fa.* bound the chattels of the defendant from its teste. As this had the unjust effect to overreach and defeat sales made even before the writ was delivered to the sheriff, it was remedied by the statute of 29 Charles II, which made the writ binding from the time of its delivery to the sheriff to be executed. We have very few if any decisions as to what the common law in this country is, because the subject is, in most of the states, regulated by express statute. Thus, in New York, the statute of 29 Charles is re-enacted expressly: *Ray v. Birdseye*, 5 Denio 619, 624; see also *Hotchkiss v. McVickar*, 12 Johns. 403. So in Indiana: *McCall v. Trevor*, 4 Blackf. 496. So in Illinois: *Marshall v. Cunningham*, 13 Ill. 20; *Dodge v. Mack*, 22 Id. 93. So in Kentucky: *Tabb v. Harris*, 4 Bibb, 29, 31; *Arberry v. Noland*, 2 J. J. Marsh. 421. So in Florida: *Love v. Williams*, 4 Fla. 126; and Maryland: *Furlong v. Edwards*, 3 Md. 99; and Alabama: *McMahan v. Green*, 12 Ala. 71, 46 Am. Dec. 242; *Jordan v. Mead*, 12 Ala. 247; *Andress v. Roberts*, 18 Ala. 387. In Missouri, as between two officers, the first levy holds, though the writ was delivered last. *Field v. Milburn*, 9 Mo. 488, 492. In California and Ohio, by statute, the lien is from levy only. In North Carolina, where the common law, as a body, is adopted, the lien is from the teste: *Harding v. Spivey*, 8 Ired. 63; and Tennessee follows North Carolina: *Union Bank v. McClung*, 9 Humph. 91; *Barnes v. Hayes*, 1 Swan. 303.

[*237] In the absence of statute, we must conclude that the execution is a lien either from its *teste* as at common law, or only

from *actual levy*. We do not feel bound to adopt the unreasonable and unjust rule of the ancient common law, so unjust, indeed, that it had to be remedied by statute.

It does not accord with the policy of our laws, nor harmonize with decisions on kindred subjects. The whole current of judicial decisions, in this state, has ever, and, we think, most wisely, been against secret constructive liens, especially when these are set up against purchasers. *Barney v. McCarty*, 15 Iowa, 510; *Barney v. Little*, Id., 527; *Cummings v. Long*, 16 Iowa, 41; *Jones v. Peasley*, 3 G. Greene, 52; *Gimble v. Ackley*, 12 Iowa, 27. And we are not mistaken in saying that the professional sentiment in this state has always been, that executions were not liens on chattels until actual levy.

This was the opinion of the court below, and in this respect there is no error. * * *

Affirmed.

ERSKINE v. STALEY.

38 Virginia (12 Leigh) 406. (1841.)

Under 29 Car. II.—Lien of Garnishment—Garnishment v. Levy, Priority—Payne v. Drewe Distinguished.

Bill for injunction by Erskine & Eichelberger against Hamilton & Cost, Staley, and the sheriff of Jefferson county. From a decree dissolving the preliminary injunction granted on filing the bill, complainants appeal. Reversed.

Erskine & Eichelberger sued Staley by foreign attachment in chancery serving J. G. Johnson as garnishee, July 14, 1837, for goods in his hands belonging to Staley. Afterward Hamilton & Cost, having sued Staley by *capias* which was returned *non est inventus*, were awarded an attachment to which the sheriff returned: "Levied Aug. 9th, 1837, on sundry household furniture and store goods, * * * which were previously attached in the hands of J. G. Johnson by foreign attachment and surrendered by said Johnson to me subject to said attachment." Hamilton & Cost, having obtained judgment and an order to the sheriff to sell the goods in his hands to satisfy said judgment and costs, complainants exhibited this bill at the November term (1837), praying that the sale be restrained and claiming priority.

Lyon & Stanard, for complainants.

Robinson, for defendants, insisted that this case was controlled by *Payne v. Drewe*, because complainants had made no levy, citing other cases also.

The Court by Allen, J. * * * The foreign attachment was first executed; and the only question of interest presented by the case, is, whether a creditor coming by operation of law, after the service of the *subpoena* in chancery on the home defendant, is entitled to priority?

This court has decided, in the case of *M'Kim v. Fultons*, 6 Call 106, that the endorsement by the clerk, according to the practice of the country, is sufficient to restrain the application of the effects to any other use, and is a substitute for the formal order required by the words of the statute; and that case, and the case of *Williamson v. Bowie* 6 Munf. 76, decide, that a *subpoena* so endorsed, operates, from the date of its service, to inhibit any alienation by the absent debtor. According to these adjudications, the lien acquired by the service of the *subpoena* cannot be defeated by any act of the debtor, except in the manner prescribed by the statute: namely, the giving bond to abide by the decree. This being the law, it would seem to follow, almost as a necessary consequence, that no subsequent creditor coming in, not by the act of the party, but under the operation of law, can defeat the lien. As a general rule, the creditor is entitled to those rights only, which the debtor held. Even in the case [*422] of a fraudulent deed, though it is good as between the parties, it is void as against the creditor; as to him the property remains in the debtor, as if no deed had been executed. Therefore, when it is conceded that the debtor, by no transfer or incumbrance, can defeat the lien of the attachment; that assignees coming in under him must take subject to the rights of the attaching creditor; if it is held, that a creditor coming in afterwards by operation of law is to be first satisfied, he will acquire rights which the debtor himself had not. If the statute is to receive such a construction, cases might, and, in practice, probably would occur, presenting strange anomalies. The attaching creditor's lien is superior to the claim of the *bona fide* assignee; the right of the *bona fide* assignee is confessedly superior to that of a creditor whose execution has not been delivered to the

sheriff before the assignment or transfer ; but if the principle contended for by the appellees is law, the creditor by execution, who is subordinate to the assignee, is to be preferred to the attaching creditor, whose claim is superior to that of the assignee.

It was argued, that the lien created by the service of the attachment in chancery, results from an application of the doctrine of *lis pendens*; that this authorizes the court to prevent the party himself from defeating the creditor by any alienation of the subject, but does not extend to the case of a creditor coming in by act of law. The proceeding by foreign attachment is a proceeding *in rem*; the jurisdiction rests upon the fact, that the absent debtor has effects subject to the control of the court ; and if no effects are found, the court has no authority to proceed. But when its jurisdiction once attaches, the court, according to well settled principles, may go on to do justice. If, however, the effects of the absent debtor may be taken from under its control by another creditor coming with a *fi. fa.*, the foundation upon which its jurisdiction rested will have been swept [*423] away, and the plaintiff will be without remedy. So that, even admitting we were to look to the doctrine of *lis pendens* for the source of the lien of the attaching creditor, it seems to me, in a case like this of a proceeding *in rem*, where the jurisdiction of the court depends upon the existence of effects subject to its control, if that jurisdiction has once properly attached, it can never be ousted either by the act of the party himself or of any third person. The terms of the statute, it seems to me, will admit of no other construction; "the court may order the debts to be paid and effects to be delivered, to the plaintiff, upon his giving security for the return thereof, to such person and in such manner as the court shall direct." He holds them subject to the order of the court alone. Would it be any defence in an action upon the bond given by him to return them, to say they were taken from him by a subsequent execution? * * * Time by the law is given to the absent defendant to show cause against the decree. The effects can be held by the court until the period expires, and then, I presume, as the decree has become absolute, there could be no doubt of the propriety of applying the [*424] effects to the discharge of

the decree, without requiring security. But under the construction contended for, it would be in the power of any creditor getting a judgment by law, to levy on these effects, and so deprive the attaching creditor of the fruit of his decree. * * *

It was contended, that as there was no actual seizure, no levy on specific effects, which were thus placed under the custody of law, the *property* in the goods remained in the debtor, and being in him other creditors might levy on them. But granting that no actual seizure is made so as to divert the property of the debtor, the consequence deduced does not follow. The legal property of goods may remain in one, subject to the equitable lien of another ; and third persons coming under the first, must occupy his position and hold subject to the lien. For many purposes the property of the goods may rest in the debtor, notwithstanding the service of the attachment. Thus, in several attachments against the same absconding debtor, the attachments are levied successively on the same goods as his property, and they are paid according to the dates of their respective levies. So with executions. And in the case of foreign attachment, where the real estate is proceeded against, there is no seizure, no divesting of title, and from the nature of the subject cannot be.

But, in truth, I look upon the service of the attachment as equivalent to an actual levy. The effects may remain in the hands of the garnishee, but under the control of the court : he acquires a special property in them as agent of the court : and this property is sufficient to protect him against the claims of the owner ; it is his duty so to protect himself ; and upon his failure, a personal decree will go against him. The property of the goods is so far divested as to prevent a recovery by the party. And this distinguishes the case from *Payne v. Drew*, which has been so much pressed on the court. * * * Lord *Ellenborough*, without deciding what was the effect of a writ of sequestration, * * * held, that it did not so vest the property in the goods absolutely, as to defeat a sale made by the sheriff under an execution ; that the property of the goods was not altered, but continued in the defendant till execution executed. And this, it seems to me, is very clear from this consideration, that if no levy is made before the return day, the goods cease to be

bound, and an alienation made whilst the writ was in force could not be overreached by a levy on a subsequent writ. The writ, when executed, related at common law to the time of the *teste*, and now to the time of the delivery, so as to overreach intermediate alienations. Having decided that the sheriff could have levied, and made a valid sale, [*426] notwithstanding the writ of sequestration in the hands of the sequestrators, he proceeded to show, that, under the special circumstances of that case, the sheriff would not have been liable to the action of the party grieved. If, however, I am right in supposing that a foreign attachment is tantamount to an actual levy, that it places the effects under the control of the court, and so far vests the property in the garnishee or agent of the court, as to defeat all claims or transfers of the defendant,—the case stands upon wholly different grounds. * * *

On the facts in this case, I think the proceeding by way of foreign attachment was fully warranted; and that the application to the court to enjoin the sale under the order of sale in *Hamilton & Cost's* action at law, was regular, and indeed the only remedy the plaintiffs in the foreign attachment could resort to. [*427]

I think, therefore, the court below erred in dissolving the injunction. * * * The other judges concurred.

Decree reversed, and cause remanded.

The remark in the opinion that injunction was complainant's "only remedy" is mere dictum and clearly not well advised. The garnishee might sue for the taking of the property if he had not consented, (*Deno v. Thomas*, 64 Vt. 358, 24 Atl. 140), or the garnishing creditor might recover the value of the property in trover against the sheriff [*Rockwood v. Varnum*, 17 Pick. (Mass.) 289] or against the execution creditors themselves, if they were parties to the levy (*Focke v. Blum*, 82 Tex. 436, 17 S. W. 770, and cases cited therein), or, having recovered judgment against the garnishee, might have execution thereon against the garnishee's own property for his failure to produce the garnished property, unless the garnishee has, without avail, exhausted all legal means to prevent the property being taken from him (*Johann v. Rufener*, 32 Wis. 195), for it is the garnishee's duty as an officer of the court to retain the property and dispose of it as his court shall direct. *Stiles v. Davis*, 66 U. S. (1 Black) 101.

Nature of the Garnishing Creditor's Lien or Right. Under facts very much like those in *Erskine v. Staley*, the supreme court of Nebraska held the garnishing creditor entitled to the appointment of a receiver to take possession of the property which the garnishee threatened to abandon, Maxwell, C. J., saying: "Neither can

the right be restricted to the personal liability of the garnishee, as he might be insolvent or unable to pay the value of the property. We hold, therefore, that garnishment is an attachment of the goods in the hands of the garnishee. * * * In this case it is alleged in the petition that a number of executions had been levied by the defendants * * * and that a sale thereunder would defeat the plaintiff's claims. In such a case while the plaintiffs have a remedy at law by bringing separate actions against the defendants, still it would not be adequate. An action in equity, therefore, is the proper remedy to prevent a multiplicity of suits, and determine the priorities of the several liens of the parties. Sec. 213 of the code provides that "The court, or any judge thereof at chambers may, on application of the plaintiff and on good cause shown, appoint a receiver * * *" Sec. 214 provides that "Such receiver shall take possession * * *" These sections apply alone to property taken under an attachment. Where the garnishee abandons the property, however, as is alleged in the petition in this case, there is no doubt of the power of the court to appoint a suitable person to take charge of the same. The court possesses this power independently of the statute. The property being a trust fund for the satisfaction of the judgment the court may, when necessary for the preservation of the property, appoint a trustee to take charge of the same." *Northfield Knife Co. v. Sharpleigh*, 24 Neb. 635, 39 N. W. 788. See also *Almy v. Platt*, 16 Wis., 169; *Dahlman v. Greenwood*, 99 Wis. 163, 74 N. W. 215; *Barton v. Spencer*, 3 Okl. 270, 41 Pac. 605.

Contra. I believe the strongest cases against a lien being created by garnishment are the following: *Bigelow v. Andress*, 31, Ill. 322, in which it was held that because the plaintiff acquired only the right to the personal liability of the garnishee, a court of equity would not intervene by injunction to preserve the property in his hands. *Johnson v. Gorham*, 6 Cal. 195, 65 Am. Dec. 501, apparently conflicts with *Erskine v. Staley*, and perhaps the court adopted the view urged by defendant's counsel in this case. The court awarded the fund to the creditor whose execution was levied on the property, after the garnishment, saying: "The service of a copy of execution and notice of garnishment upon a third party, constitutes no lien on property of the debtor in his hands capable of manual delivery." Afterward a decision more favorable to the garnishing creditor's lien was rendered by the same court. A growing crop was attached as "property not capable of manual delivery" by "leaving with the person owing such debt or having in his possession" such property (in this case the defendant himself), "a copy of the writ, and a notice," etc. Then the debtor mortgaged the unharvested crop; then the sheriff took it under his writ, and then the mortgagee's assignee sued him for conversion; but the court held that the attachment lien was the better title. *Raventas v. Green*, 57 Cal. 254.

It has been held that garnishment does not give such a lien as to enable the creditor to maintain a creditor's bill to ascertain the title to the property, *Hunt J.*, dissenting. *Wilson v. Harris*, 21 Mont. 374, 54 Pac. 46. To same effect see *Childs v. Carlstein Co.*, 76 Fed. Rep. 86.

11. HOW THE LIENS MAY BE LOST OR BECOME SUBORDINATE.

Under this head read again: *Cooper v. Reynolds*, ante, 15; *Windsor v. McVeigh*, ante, 38; *Allen v. Hall*, ante, 140; *Spring v. Ayer*, ante, 197; *Sutton v. Hasey*, ante, 198; *Smith v. Osgood*, ante, 318; *Commonwealth v. Magee*, ante, 307; *McGregor v. Brown*, ante, 342; *Payne v. Drewe*, ante, 338; *Conn v. Coldwell*, ante, 425; *Hagan v. Lucas*, ante, 418; *Smallcomb v. Cross*, ante, 445; *Kennon v. Ficklin*, ante, 451; *Richards v. Morris C. & B. Co.*, ante, 543; and *Pulliam v. Osborne*, ante, 454.

ACTON v. KNOWLES.

14 Ohio St. 18. (1862)

Sheriffs—Liability for Failure to Make Amount of Execution—Diligence Required of Execution Creditor—How far Affected by Negligence of Officer—Jury's Province—Duty of Officer and Creditor if Not Time to Sell before Return Day.

Action by Acton & Woodnutt, against Horace C. Knowles, sheriff of Athens county, for making a false return to two executions in favor of plaintiffs, one a *fi. fa.*, the other a *venditioni exponas*, the returns complained of being that the stallion levied on under plaintiff's *fi. fa.* was subject to a previous levy by a former sheriff in favor of another creditor, returned "not sold for want of time." From judgment for defendant and order denying motion for new trial, plaintiffs bring error. Reversed.

W. R. Golden, for plaintiffs.

A. G. Brown and *James Wilcox*, for defendant.

The Court by Peck, C. J. * * * Ch. J. Savage, in *Russell v. Gibbs*, 5 Cow. 390, examines, at some length, the English and New York cases as to the effect of delay in the sale of property levied on execution, and arrives at the conclusion, that mere indulgence or negligence of the sheriff to proceed and sell, *without any act of the plaintiff*, will not render the levy fraudulent as to subsequent executions; but that the rule is otherwise where the creditor himself directs or sanctions such delay. It is also said in that case,

that an unreasonable delay or omission to urge the sheriff to do his duty, may, in some cases, be construed into a consent on the part of the creditor to such delay, and thus postpone his lien to that of junior executions. These positions, thus qualified, are fully sustained by the authorities cited in the opinion, and supported by subsequent decisions in that and other states. *Butler v. Maynard*, 11 Wend. 548, 552; *Benjamin v. Smith*, 4 Ib. 332; *Knower v. Barnard*, 5 Hill, 377; *Herkimer County Bank v. Brown*, 6 Ib. 232; *U. S. v. Conyngham*, 4 Dall. (Pa.) 358; Gwynne on Sheriffs, 212 and cases cited.

It is said by *Bronson, J.*, in 6 Hill, *supra*, that "in all the cases where the first execution has lost its preference, something was said by the plaintiff or his attorney, at the time the execution was issued, or at some subsequent period, from which [*28] the sheriff could reasonably infer that he was authorized to give indulgence, instead of complying strictly with the command of the writ."

In New York the common law doctrine prevails, that the execution of the writ is an *entirety*, consequently, the officer making a levy on execution, must complete the duty by a sale in pursuance of its mandate, and a subsequent *venditioni exponas*, or *distringas*, if issued to him, confers no new or additional authority, but only spurs him on, it is said, to a speedier execution of the power already conferred. Under our practice, however, a sheriff who has returned the writ "levied, but not sold for want of time," can not be required to proceed and sell until a *vendi.* is placed in his hands, for that purpose, by the creditor in execution.

The rule deducible from the cases cited, as applicable to our practice, in which, after return of execution "not sold for want of time," the plaintiff must himself initiate the further proceedings to sell, is this,—that if there has been an *unreasonable* delay in completing the execution by a sale, at the instance and by the authority of the plaintiff, such unreasonable delay may have the effect of postponing his, in a certain sense, dormant process, to that of a more vigilant though junior execution creditor. Mere delay, if not unreasonably protracted, will not have such effect; but where the delay is unreasonable, in view of the rights of other creditors, the character and condition of the property levied on, and the uses to which it is, in the meantime, applied, it is just and

proper that a limit should be placed upon the indulgence of the creditor holding such prior lien.

The question whether such delay was reasonable or unreasonable in a given case, depends upon its particular circumstances and is therefore peculiarly a question for the jury, under the instructions of the court. It is manifest that a delay which is unreasonable in one case, by reason of the condition of the parties or the subject matter of the levy, would, under other circumstances, be altogether reasonable and proper.

The return of the property to the defendant after levy, to be kept by him until required for sale, either with or without [*29] security for its re-delivery, does not *per se* avoid the levy. The debtor thereby became the bailee of the property, and the officer was still constructively in possession. But such fact, coupled with others, relating to the intended duration of such possession; the authority delegated to the debtor or exercised by him with the knowledge and assent of the sheriff; the uses to which it was, in the meantime, to be applied; the benefits, if any, resulting from its custody, and the subsequent delay in bringing the property to sale, may be of much significance in determining whether the levy was not, in part at least, designed to protect the property from seizure by other creditors, for the benefit of the debtor, and therefore fraudulent as to them.

In the case at bar, an execution in favor of the Exchange Bank of Columbus was levied September 11, 1857, upon a stallion, the property of Currier, and the execution thereupon returned to Franklin common pleas, "not sold for want of time." No further execution was issued until November 3, 1858, nearly fourteen months after return of the first, and more than four months after a levy by plaintiffs upon the same property. The sheriff upon making the levy returned the horse to defendant Currier, and permitted him to hire the horse out the ensuing season for his own benefit, the profits greatly exceeding all expenses of keeping, and never interposed to prohibit such use, or claim for the execution creditor any part of the profits arising therefrom.

The officers of the bank may not have known how the horse was disposed of; but if so, they were willfully blind. The infor-

mation conveyed by the return was sufficient to put them, as prudent men, upon inquiry as to the temporary disposition of the horse. The question would naturally occur, how and at whose expense is this horse to be supported while awaiting a sale? And the answer to such inquiry, would, at once, have put them in possession of the facts, and rendered them responsible for further continuance of that condition of things. If, on the other hand, the bank and its officers were truly ignorant of the temporary disposition of the horse, and the authority conferred upon Carrier, and are not chargeable [*30] with notice of the acts of the officer in making disposition of the property levied on, which we by no means concede, still a failure by them for more than fourteen months thereafter to offer the horse for sale, would be a circumstance for the consideration of the jury, as tending to show that one, if not the principal object of the levy and its prolongation, was to shield the property from a seizure by other creditors, for the benefit of the debtor.

In view of these circumstances it was error, we conceive, in the court to charge the jury, either as matter of law or as a foregone conclusion of fact, that the levy of September 11, 1857, was, as against the plaintiffs, a valid and subsisting levy in June, 1858, when the horse was seized under their execution.

It was a question of fact peculiarly within the province of the jury, to determine, under all the circumstances before them tending to show an abuse or perversion of the process of the court, and should have been submitted to them under proper instructions.

* * *

Judgment reversed and cause remanded.

To same effect see *McGinnis v. Prieson*, 85 Pa. St. 111.

This looks like a clear case under the rule as stated by the court, which is as generally stated. Nevertheless some courts hold to a much stricter rule. For example, in a recent case, the first creditor was held to have lost his priority by reason of consenting to a postponement of the sale from Jan. 22 to Jan. 29, and then to Feb. 8, and then to Feb. 11, and then to Feb. 13, to enable the debtor to get money to make payment and thus save his property, it being found that the action of the creditor was prompted by kindness to the debtor, without intent to delay or defraud other creditors, and although other creditors were not prejudiced thereby. *Sweetser v. Matson*, 153 Ill. 568, 46 Am. St. Rep. 911, 39 N. E. 1086.

EVANS v. BARNES.

32 Tennessee (2 Swan) 291. (1852)

**Executions—Effect of Taking Out New Writ and Making Second Levy—
Power to Sell After Return Day—Power of Sheriff After Term of
Office Expires—Character of Venditioni Exponas—When Lien
Attaches, Rights of Bona Fide Purchasers.**

Trover by Evans against Barnes for cotton mentioned in the opinion. From judgment for defendant plaintiff brings error. Affirmed.

Meigs, for plaintiff.

Cox, for defendant.

The Court by Caruthers, J. On the 8th day of November, 1850, the plaintiff bought of Ransford McGregor the six bales of cotton for which this action of trover was brought. On the same day the clerk of Rutherford circuit court issued an execution on a judgment in favor of B. Ferguson, against said McGregor, tested July term, 1850, addressed to the defendant as sheriff of Davidson county, who, by his deputy, levied the same upon the cotton on the 11th of November, 1850, the return day of the execution. This writ was returned, with the levy, to the November term, [*293] from which another *fiery facias* issued, tested second Monday of November, 1850, on same judgment, which came to the hands of defendant on November 20th, and was on same day levied upon the cotton, which was sold, December 5th, for \$355.73, as appears by the return on the last *fiery facias*. It does not appear by whom the last execution was ordered out. * * *

The levy of the execution vested in the sheriff a special property in the cotton, and was a satisfaction to the extent of its value. He became liable to the plaintiff in the execution, and the debt was extinguished for that amount. The execution was a lien from its test, second Monday in July, 1850, and overreached the title by purchase of the plaintiff's. The power of the sheriff to sell the property still continued after the return of the writ, and even after the expiration of his term of office. *Overton v. Perkins*, 10 Yerg. 328. The authorities all concur in this position, in cases of levies upon personal estate. It is otherwise when the levy is upon land.

But it is contended in this case that the sale having been made under an *alias fieri facias*, which was issued from the November term, 1850, of Rutherford circuit court, and tested on the twelfth day of that month, which was after the purchase of the plaintiff's, the first levy was waived, and the right by purchase must prevail. We do not think so. It is true that the plaintiff in the execution might waive the benefit of a levy in his favor [*294] and release the sheriff from his liability and the property from the custody of the law, in which case the original owner would have the power to make a valid sale of it. But such waiver must be distinctly and clearly proved. It is not enough, to produce this effect, that another *fieri facias* was issued, which the sheriff re-levies upon the same property, and makes his sale upon it. He had a perfect right to sell, by virtue of the title vested in him by the first levy, without any execution; or, he might have retained the first execution and sold under it during the term to which it was returnable, or after the term, when it was *functus officio*. The issue of an *alias*, or another order of sale, was not necessary to continue his right under the previous levy. Even the taking of a delivery bond, on a levy afterwards made on the same execution, or an *alias*, without forfeiture, would not be a waiver of his title, or a forfeiture of his right to sell under the first levy. *Lester's Case*, 4 Humph. 383. The issuance and use of the last execution was merely nugatory and useless; at least it did not affect his right to the property derived from his original levy, which related to, and bound, the property from the *teste* of the first execution, on the second Monday in July, 1850.

Let the judgment of the circuit court be affirmed.

To the same effect as to sale under *alias* instead of *vendi.*, see *Bouton v. Lord*, 10 Ohio, St. 453; *West v. St. John*, 63 Iowa, 287, 19 N. W. 238; *Friyer v. McNaughton*, 110 Mich. 22, 67 N. W. 978; *Menge v. Wiley*, 100 Pa. St. 617; *Wilson v. Gilbert*, 58 Ill. App. 651, 161 Ill. 49. *Contra Scott v. Hill*, 2 Humph. 143. Same as to attachment *Wright v. Westheimer*, 2 Idaho 962, 35 Am. St. 269.

ROCKHILL v. HANNA.

56 United States (15 Howard) 189. (1853)

Judgment Liens—Rights of Priority, Fractions of a Day—Election of Remedies—Effect of First Execution.

Action by Thos. C. Rockhill *et al.* against Robert Hanna *et al.*, on a U. S. marshal's bond, to recover the proceeds of an execution sale. The case is certified here by the U. S. circuit court for district of Indiana, for the opinion of this court. Rockhill *et al.*, Price *et al.* and Siter *et al.*, each recovered judgments against John Allen, Nov. 19, 1838. Price and Siter each took out *fi. fas.* which were levied on Allen's land. But previous thereto Rockhill had taken out *ca. sa.* on which Allen was imprisoned till discharged by the passage of a law in Indiana abolishing imprisonment for debt. Rockhill then took out *fi. fa.* which was levied on the land previously taken on the other *fi. fas.* The land being sold under these executions, and the proceeds being insufficient to pay all, Rockhill claimed that the money should be first applied on his judgment.

Thompson, Morrison and Mayor, for plaintiffs.

O. H. Smith, for defendants.

The Court by Grier, J. * * * In the state of Indiana judgments are liens upon "the real estate of the persons against whom such judgments may be rendered, from the day of the rendition thereof." As the statute provides for no fractions of a day, it follows that all judgments entered on the same day have equal rights, and one cannot claim priority over the other. In England, when several judgments are entered to the same term, (and by fiction of law, the term consists of but one day,) the judgment creditor, who first extends the land by *elegit*, is thereby entitled to be first satisfied out of it. The case would be much stronger, too, in favor of the first *elegit*, if one of three judgments had levied a *fi. fa.* on the goods and chattels of the defendant, the second taken his body on *ca. sa.*, and the third laid his *elegit* on his land. For each one, having elected a different remedy, would be entitled to a precedence in that which he has elected. This principle of the common law has been adopted by the courts of New York, as is seen in the cases of *Adams v. Dyer*, 8 Johns. 350, and *Waterman v. Haskin*, 11 Johns. 228; and also by the supreme court of Indiana,

in *Michaels v. Boyd*, Smith 100, where it is said, the mere delivery of an execution, as in case of personal property, will not give a priority, but the execution first begun to be executed, shall be entitled to priority.

The application of these principles to the present case would give the preference to the judgments of Siter and Price, which were levied on the land five years before the plaintiff's levy on the same. An execution levied on land, is begun to be executed, and is an election of the remedy by sale of it; and [*196] the mere delay of the sale, if not fraudulent, injures no one and cannot postpone the rights of the creditor who has first seized the land and taken it into the custody of the law for the purpose of obtaining satisfaction of his judgment. If he has obtained a priority over those whose liens are of equal date, by levying his execution, he is not bound to commence a new race of diligence with those whose rights are postponed to his own. There may be a different rule as to a levy on personal property, where it is suffered to remain in the hands of the debtor. But liens on real estate are matters of record and notice to all the world, and have no other limit to their duration than that assigned by the law.

But we do not think it necessary to rest the decision of this case, merely on the question of diligence, or to decide whether this doctrine has been finally established as the law of Indiana. The plaintiff's lien does not, by the statement of this case, stand on an equality as to date with that of the other judgments. By electing to take the body of his debtor in execution he has postponed his lien, because the arrest operated in law as an extinguishment of his judgment. It is true, if the debtor should die in prison, or be discharged by act of the law without consent of the creditor, he may have an action on the judgment, or leave to have other executions against the property of his debtor. The legal satisfaction of the judgment, which for the time destroys its lien and postpones his rights to those whose liens continue, is not a satisfaction of the debt, but, as between the parties to the judgment, it operates as a satisfaction thereof. The arrest waives and extinguishes all other remedies on the goods or lands of the debtor while the imprisonment continues, and if the debtor be discharged by the consent of

the creditor, the judgment is forever extinguished, and the plaintiff remitted to such contracts or securities as he has taken as the price of the discharge. But if the plaintiff be remitted to other remedies by a discharge of his debtor by act of law, or by an escape, it will not operate to restore his lien on the debtor's property, which he has elected to waive or abandon as against creditors who have obtained a precedence during such suspension.¹ The case of *Snead v. M'Coull*, 12 How. 407, in this court, fully establishes this doctrine. It is to be found in the common law as early as the Year Books, and is admitted to be the law in almost every state in the union. See Year Book, 33 Henry VI. p. 48; *Foster v. Jackson*, Hobart 52; *Burnaby's case*, 1 Strange, 653; *Vigers v. Aldrich*, 4 Burr. 2482; *Jaques v. Withy*, 1 Term R. 557; *Taylor v. Waters*, 5 Maule and Selwyn, 103; *Ex parte Knowell*, 13 Vesey, Jr., 192; and in New York, *Cooper v. Bigalow*, 1 Cow. 56; *Ransom v. Keys*, 9 [*197] Cow. 128; *Sunderland v. Loder*, 5 Wend. 58. In Pennsylvania, *Sharpe v. Speckenagle*, 3 Serg. & R. 463; In Massachusetts, *Little v. The Bank*, 14 Mass. 443.

The insolvent law of Indiana which discharges the person of the debtor from imprisonment upon his assigning all his property for the benefit of his creditors, provides that his after acquired property shall be liable to seizure, and also that liens previously acquired shall not be affected by such assignment and discharge; but it does not affect to change the relative priority of lien creditors, as it existed at the time of the discharge, or to take away from any lien creditor his prior right of satisfaction, which had been vested in him previous to such discharge. Neither the letter nor spirit of the act will permit a construction by which a retrospective operation would divest rights vested before its passage.

We are of opinion, therefore, that * * * the executions of Siter & Co. and of Price & Co. are entitled to be first satisfied from the proceeds of the sale.

So certified to the said circuit court.

To same effect on similar facts, *Miller v. Starks*, 13 Johns. (N. Y.) 517. A direction by the creditor to the sheriff to levy on certain property

¹*Jackson v. Benedict*, 13 Johns. 533. Setting aside a return of "satisfied" on a fl. fa. does not revive the judgment lien on land so as to defeat innocent mesne purchasers. *Taylor v. Ranney*, 4 Hill (N. Y.) 619.

is not an abandonment of his lien on the remainder, and the sheriff who has levied on that part may at any time before the return-day levy on and inventory other property, though the defendant has in the meantime assigned for the benefit of creditors, the writ being a lien from the date of its delivery. *Moses v. Thomas*, 26 N. J. L. 124.

ERICKSON v. DULUTH, SOUTH SHORE & ATLANTIC RY. CO.
105 Michigan 415, 63 N. W. 420. (1895)

Garnishment—Effect of Non-Suit in Main Action—Effect of Appeal—Powers of Lower Court While Appeal Is Pending—Garnishment an Action or an Ancillary Proceeding.

Garnishment by Edward Erickson against Duluth, South Shore & Atlantic Ry. Co. as garnishee of Mark Cupperhill, principal defendant. From judgment charging the garnishee it brings error. Reversed.

Erickson sued Cupperhill in justice court and immediately had the railway company summoned as garnishee, and it answered confessing liability for \$39.65. Thereafter the main action was tried and the justice rendered judgment, no cause of action. Plaintiff appealed to the circuit court, giving the garnishee notice thereof, and the justice returned the record in the main action to the circuit court without the record of the garnishment proceedings, and thereafter mailed a discharge to the garnishee, and still later returned the garnishment record to the circuit court, showing the discharge above mentioned. On the trial of the main action in the circuit court judgment was rendered for plaintiff, and immediately thereafter, on motion of plaintiff's attorney, judgment was rendered against the garnishee for the amount admitted in its answer. The garnishee having made no appearance in that court, claims that it acted without jurisdiction in rendering judgment against the garnishee because the judgment for defendant, by statute terminated the liability of the garnishee; and at all events the liability could not thereafter be enforced, because the statute does not provide for any further proceedings.

A. E. Miller, for garnishee.

John R. Rood, for plaintiff.

The Court by Hooker, J. * * * While § 8041 (How. St.) treats plaintiff's failure to recover "judgment against the defendant" as a discontinuance, § 8038 provides that, after the "final determina-

tion of the suit against the defendant," proceedings may be taken before the justice to obtain a judgment against the garnishee. This is consistent with the claim of plaintiff that the garnishee is not released by a judgment in favor of defendant unless it is final. Section 8040 also contains the expression "final determination," and prescribes the pleading and procedure against the garnishee "after a final determination of the suit pending against the defendant." It would require an unusually strict construction of § 8041, and the exclusion of the other sections, to hold that the garnishee would be released by a judgment in justice's court in the defendant's favor, when the plaintiff had appealed. Such construction would be at variance with the rule in attachment cases, it having been held that a judgment against a plaintiff, appealed from, does not dissolve the attachment, but the lien of the writ continues until the final disposition of the case against him. *Treat v. Dunham*, 74 Mich. 114; *Vanderhoof v. Prendergast*, 94 Id. 18. By analogy the same would be true in garnishment cases, unless the statute upon which the right depends indicates the contrary. The garnishee, under this chapter, would be discharged when the action was finally determined against the plaintiff, but he is chargeable with knowledge of the law which gives the right of appeal, and that, if the appeal is taken, he is not released until final judgment. The supreme court of Iowa has held that a judgment of nonsuit dissolves an attachment, and that it will not be revived by the vacating of the judgment. *Brown v. Harris*, 2 G. Greene, (Iowa) 505; *Harrow v. Lyon*, 3 Id. 157, 159. See, also *Clap v. Bell*, 4 Mass. 99; *Suydam v. Huggerford*, 40 Mass. (23 Pick.) 465. But the latter case recognizes [*419] the rule that the attachment is not dissolved where the plaintiff appeals. See, also, *Sherrod v. Davis*, 17 Ala. 312; *Danforth v. Rupert*, 11 Iowa, 547, 551. Such has already been shown to be the rule here. In *Dolby v. Tingley*, 9 Neb. 412, 416, the court said: "Where no steps are taken to dissolve the attachment, the garnishee is bound from the time of service until final judgment." *Chase v. Foster*, 9 Iowa, 429; *Kennedy v. Tiernay*, 14 R. I. 528, 530; *Puff v. Huchter*, 78 Ky. 146. It is true that these decisions all depend upon the statutes of their respective states, but they show the trend of the authorities when.

the statutes are open to the construction that the garnishee is bound until final judgment.

We have next to inquire concerning the effect of the new section added in 1891 (Act No. 178, Laws of 1891, § 28), and the justice's order under it. This section provides: "In all cases where the defendant prevails or takes an appeal in the principal suit, the court shall make an order releasing said moneys so garnished. Said order shall be directed to the garnishee defendant, and shall be delivered to the principal defendant * * * "

It must be read with those already discussed, for the latter are not repealed. Unless we are to adhere to the defendant's construction, viz., that this section means that the justice shall discharge the garnishee in cases where the defendant prevails before the justice in the principal suit, this section is not inconsistent with the sections already discussed, and the construction herein placed upon them. If it is to be so construed, it is inconsistent with them. It is also noticeable that this section does not provide that the justice, but that the *court*, shall make the order of discharge, thus putting it into the power of whatever court shall render the final judgment to make this order. It seems to be intended that [*420] this order shall be made upon application of the principal defendant, and for his benefit, and apparently was designed to facilitate the collection of his claim from the garnishee, after the garnishee's liability to the plaintiff should have ceased. We are therefore of the opinion that the adverse judgment did not release the garnishee from the plaintiff's claim.

Authorities will be found which indicate that the plaintiff should have appealed from the order discharging the garnishee, and that, not having done so, he cannot now question it. Such a case is *Brown v. Tuppeny*, 24 Kan. 29. See, also, 8 Amer. & Eng. Enc. Law, 1258. Under the statutes cited, the justice had no authority to do more in the garnishee case than to take and file the disclosure, and adjourn the proceeding until judgment should be rendered; and we have already said that this means final judgment. The appeal removed the principal case from his jurisdiction, and thereafter only the circuit court had authority to make the order of discharge. The order made by the justice was made

before the appeal was taken, and was premature. He had no authority to make it. He should have waited the statutory period within which the plaintiff might appeal. His order was therefore void, and it was not necessary for the plaintiff to appeal from it. The case of *Kennedy v. Tiernay*, 14 R. I. 530, involves this question. The court said: "The court is not called upon to pass upon the liability of the garnishee until the plaintiff has established his claim, and obtained a judgment against the defendant. If the plaintiff fails in the suit against the defendant, the question of the garnishee's liability does not arise." In this case the court held that the appeal brought up the garnishee proceedings as incident to the principal suit.

This brings us to the remaining question in the case, viz., whether the garnishee proceeding was brought to [*421] the circuit by the appeal of the principal suit, so that the circuit court might enter a judgment against the garnishee. The authorities are not harmonious upon this subject. Some cases—like the Rhode Island case cited—hold this doctrine. Counsel for the plaintiff cites several cases to the proposition that the garnishee proceeding is ancillary to the principal case, and must, of necessity, follow it when it is appealed. But we think this must depend upon the statute, and that our statute clearly shows a contrary intention on the part of the legislature. * * *

In our opinion, the statute contemplates that the action in justice's court against the garnishee should remain in abeyance pending the appeal in the principal case. After judgment the justice might issue his summons to show cause, the issue could then be joined, and proof of the circuit court judgment, when introduced, would furnish the foundation for a judgment against the garnishee. Inasmuch as this practice was not [*422] followed, we have no alternative but to reverse the judgment. No new trial will be necessary, as the circuit court has no jurisdiction of the proceeding.

Reversed.

This is the only decision I am aware of holding that the garnishment does not go with the main action if it survives, but a court of error will not consider errors in the garnishment proceedings on error from the judgment in the main action. Judgment discharging the gar-

nishee has been held not to be stayed by an appeal in the absence of an express order preserving the plaintiff's lien. *Maxwell v. Bank of New Richmond*, 101 Wis. 286, 77 N. W. 149; *Webb v. Miller*, 24 Miss. 638.

In Michigan, now.—“In all cases where the plaintiff shall appeal * * * the justice * * * shall return all garnishment proceedings ancillary to such suit, together with the main action to the court to which the appeal is taken, and thereafter proceedings against the garnishees may be conducted in said last mentioned court in the same manner in all respects as if originally commenced therein.” *Comp. Laws*, (1897) § 1018.

Nearly all the decisions are that an appeal from the judgment for defendant preserves the lien if plaintiff observes the proper steps. Besides cases cited in the opinion see *Munn v. Shannon*, 86 Iowa, 363; *Lowenstein v. Powell*, 68 Miss. 73; *Ryan Drug Co. v. Peacock*, 40 Minn. 470; *Riley v. Nance*, 97 Cal. 203; *Caperton v. M'Corkle*, 5 Gratton (Va.) 177. But compare *Maxwell v. Bank of New Richmond*, above, and *Contra Camp v. Hilliard*, 58 N. Hamp. 42.

ROCCO v. PARCZYK.

77 Tennessee (9 Lea) 328. (1882)

Appeal by Defendant—Effect on Previous Levy—Realty or Personality, Distinction—Garnishment an Action or an Ancillary Proceeding—Jurisdiction of Lower Court While Appeal is Pending.

Garnishment on execution in favor of B. Rocco on his judgment against Joseph Parczyk, the garnishees summoned being R. D. Frayser, David Corrotti and Union and Planters' Banks. Defendant having appealed from the judgment against him, the execution was quashed and the garnishees discharged on motion, and plaintiff appeals.

Jarnigan and Frayser, for plaintiff.

W. M. Randolph, for principal defendant.

The Court by McFarland, J. * * * The first question arising upon this appeal is, whether the levy of the execution by garnishments was discharged by the subsequent appeal in error of the defendant in the judgment. Ordinarily the question cannot arise, as no execution issues during the term, and an appeal in error cannot be granted after the term has been adjourned. It can only arise in [*333] cases where by special statute execution may issue before the time for appealing has expired.

It is argued that the appeal in error does not vacate, but only suspends the execution of the judgment below, and hence should

not be held to displace or discharge any liens or rights acquired in the meantime. It is assumed to be analogous to a case where a writ of error and *supersedeas* issues after the levy of an execution, and it may be conceded that the analogy is complete. It may also be conceded that the service of the garnishment fixes a lien upon effects of the debtor or debt due to him from the garnishee equivalent in this respect to an actual levy upon personal property.

We do not find that the effect of a writ of error and *supersedeas* from this court as to the levy of an execution issued upon the judgment superseded has been decided. It has been decided, however, that the issuance of an injunction discharges the lien of an execution levied upon personal property, and authorizes the officer to return the property to the debtor: *Overton v. Perkins*, 8 Tenn. (M. & Yer.) 367, 373. And such also has been held to be the effect of a *certiorari* and *supersedeas* to bring up to the circuit court the judgment of a justice of the peace: *McCamy v. Lawson*, 40 Tenn. (3 Head) 256; *Littleton v. Yost*, 71 Tenn. (3 Lea) 267. This seems to us to be in principle identical with the question before us. The effect of the *supersedeas*, it is true, is simply to supersede and suspend further proceedings and not to reverse or undo what has been done, and so says Judge Caruthers in *McCamy v. Lawson*: "At [*334] first view it would seem that the effect of the *supersedeas* should only be to suspend the sale, but not to release the property; and as an original question we might be inclined to so hold, but we consider the contrary to be too well settled to be now disturbed by the courts." This rule is different as to a levy upon real estate: See above case and *Littleton v. Yost*, 3 Lea, 267.

The exception as to personal property is from necessity, for it would ruin both debtor and creditor if the sheriff is to hold personal goods to the termination of an injunction bill in chancery, or a writ of error and *supersedeas* in this court. No injury can result to the creditor where bond and security is given, but it does not alter the question that the process is obtained upon the pauper's oath, as held in *McCamy v. Lawson*.

In a case like the present another difficulty would occur. At the time the garnishment process was returned, the cause had been

brought to this court by the appeal in error; it was therefore clear that the circuit court at that time had no jurisdiction to require the answer from the garnishees, and to render judgment against them if their answer should authorize a judgment. Any decree or judgment rendered in the inferior court after the cause is in the supreme court by writ of error and *supersedeas*, is without jurisdiction and void: *Claiborne v. Crockett*, 19 Tenn. (Meigs) 607.

Hence no steps could have been taken. At most, the court could only supersede further proceedings. In the event the writ of error and *supersedeas* should [*335] be dismissed without final judgment in this court, the circuit court might proceed, but the process against the garnishees would probably in the meantime have been discontinued. Besides, the practice is to render final judgment and award execution from this court. * * *

If this proposition be considered doubtful, the result in this case must be the same, as the answer of the garnishees does not admit any liability. * * * [*336]

The judgment must therefore be affirmed.

Judge Cooper places his concurrence upon the latter ground.

In some cases the lien is held to be released by the appeal because the sole object of the lien is to secure payment, and after the appeal that is amply secured by the appeal bond. *Otis v. Warren*, 16 Mass. 53; *Bushey v. Rath*, 45 Mich. 181, 7 N. W. 802; *St. Joseph & c. Ry. Co. v. Casey*, 14 Kan. 504; *Parker v. Dean*, 45 Miss. 408; *Ela v. Welch*, 9 Wis. 395. But in other cases it is held that the lien remains and the appeal bond is a cumulative security. *Magill v. Sauer*, 20 Gratt. (Va.) 540. See also *Collins v. Burns*, 16 Colo. 7, 26 Pac. 145; *McCants v. Rogers*, 3 Brev. (S. Car.) 388, 1 Tread. 443; *Peterson v. Wayne Circuit Judge*, 108 Mich. 608.

REID v. LINDSEY.

104 Pennsylvania St. 156. (1883)

Debt on bond of indemnity, by Lindsey, Sterrit & Co. against George T. Van Doren, obligor, and Lewis Shanafelt and John C. Reid, sureties, Reid only being served. From judgment for plaintiffs Reid brings error. Reversed.

The bond sued on was given by Van Doren as general assignee for creditors of David M. Sample, to obtain a stay of execution in favor of plaintiffs herein against said Sample, which, before said assignment, had been levied on Sample's merchandise and

store fixtures, Van Doren having petitioned for said stay and that the judgment be opened to let him show the judgment to be excessive. Afterward the judgment was opened for that purpose, the issue twice retried and judgment finally entered for plaintiff for \$822 instead of \$923, the amount of the original judgment. In the meantime Sample was adjudicated a bankrupt, but the assignee in bankruptcy never interfered with the goods.

On the trial of the present action defendant offered to prove the value of the property subject to the levy at the time the last judgment was rendered to show that the greater part of it could have been realized therefrom. This testimony was objected to on the ground that by opening the judgment the lien of the levy was discharged. The objection being sustained and exception taken presents the only question before this court.

B. J. & A. B. Reid, for defendant Reid.

W. L. Corbett (J. H. & J. B. Patrick with him), for plaintiffs.

The Court by Green, J. We decided in *Batdorff v. Focht*, 44 Pa. St. (8 Wr.) 195, that the lien of a *fi. fa.* upon goods levied on under the writ was not lost by reason of a judicial order staying it until a rule taken on part of the defendants should be disposed of, although there was no stipulation in the order staying the writ that its lien should remain. The very question was raised on the record on distribution of the proceeds of the goods which were sold on a subsequent writ, and the money was awarded to the first writ upon the express ground that the lien was not lost. The same doctrine was again declared in *Bain v. Lyle*, 68 Pa. St. (18 P. F. S.) 60, and although in that case a bond had been given for the return of the goods, it was held to be no substitute for the [*160] goods, and that the lien of the execution was not discharged. In *Kightlinger's Appeal*, 101 Pa. St. (5 Out.) 540, these cases were recognized as full authority for the rule, and would certainly have been applied had the circumstances of that case required it. It was unnecessary to do so, but only because an order continuing the lien had been made when the stay of proceedings was granted. The rule itself was vindicated by *Woodward, J.*, in *Batdorff v. Focht*, by the proposition that the lien of *fi. fa.* after levy is a vested lien which cannot be impaired by an interlocutory order. Al-

though, as was there said, it is the usual and proper practice to direct that the lien shall remain, when a stay is ordered, it was held to be unnecessary. The judge said, "But where, as in this case, it is omitted, the lien must, nevertheless, be regarded as preserved, for it is one of the vested legal rights of the plaintiff, and can no more be sacrificed by an edict of the court without a hearing than any of his other civil rights, whether of liberty or property." This reasoning is so entirely satisfactory that it need not be extended. In *Batdorff v. Focht*, and in *Kightlinger's Appeal* the lien was made effective by awarding priority to the writs in the distribution of the proceeds of the sale of the goods upon subsequent writs, although in the latter case an interval of nearly four years elapsed between the granting and discharge of the rule to open the judgment. In *Bain v. Lyle* an execution against Austin was levied upon goods which were claimed by Corry. The latter gave an interpleader bond to the sheriff, and the goods were thereupon delivered to him. Subsequently they were sold on an execution against Corry, and purchased by a stranger. The interpleader issue being decided in favor of Austin, it was held he might follow the goods in the hands of the purchaser at the last sale. This, of course, was upon the theory that the original execution creditor could not be deprived of his recourse to the goods, notwithstanding they had been given up to the adverse claimant upon his substituting an interpleader bond in their place. In the present case the bond given was a general indemnity bond only, and in no sense a substitute for the goods. It was for indemnity against all damages which might be sustained by reason of the order staying proceedings. It contained no provision for a return of the goods. It is plain then that if any of the goods originally levied upon still remained in the possession of the defendant in the execution, or of his assignee, for the benefit of creditors, who is merely his representative [*In re Fulton's Est.*, 51 Pa. St. (1 P. F. S.) 204], it was the right of the plaintiff to seize them by another writ, and sell them in satisfaction of his claim. If they had passed to an assignee in bankruptcy, which does not appear in the testimony, they would still be subject to the lien of the levy originally made. The offer [*161] of proof was somewhat indefinite, but in substance, it

was proposed to show the value of the goods which remained subject to the levy at the time of the final judgment, and that the plaintiffs could have realized the greater part of their judgment out of personal property which remained subject to the levy. This offer was rejected on the ground that the lien of the execution was discharged, and that the property had passed to an assignee for the benefit of creditors, and afterward to an assignee in bankruptcy. This was an insufficient objection, and the learned court below was in error in rejecting the offer, and the judgment must therefore be reversed. The evidence offered was material because it might show that the sureties in the indemnity bond were released in whole or in part by the omission of the plaintiffs to seize and sell the remaining goods.

Judgment reversed and venire de novo awarded.

This case must be distinguished from *Field v. Macullar*, ante, p. 432, in which the judgment was reversed on motion of the judgment debtor. As there can be no execution without a judgment to be executed it is clear that if the judgment is set aside the execution and all proceedings thereon must fall. See *Karr v. Schade*, 75 Tenn. (7 Lea) 294; *Spaulding v. Lyon*, 2 Abb. New Cas. (N. Y.) 203; *May v. Cooper*, 24 Hun (N. Y.), 7. Thus it was held that an execution on a judgment against three was vacated by reversing the judgment as to one of the defendants. *Phillips v. Wheeler*, 67 N. Y. 104. But in the present case the judgment remained so far as the judgment defendant was concerned. All that was done was to allow a claimant of the goods to show a defense. Compare *Richards v. Morris C. & B. Co.*, ante, 453.

While *Reid v. Lindsey* and *Rocco v. Parczyk*, above, might perhaps be reconciled with each other, the decisions cited in them could not. At common law a writ of error operated as a supersedeas from the time of its allowance without any special order to that effect, and it is only where similar operation is given to the statutory appeal or writ of error under the statute that such decisions as *Rocco v. Parczyk* are found, unless a supersedeas was expressly granted by the court; from which the real conflict between that case and *Reid v. Lindsey* clearly appears. It is quite as reasonable to hold that the bond given to obtain the supersedeas should take the place of the property as that the bond for the appeal, which operates as a supersedeas, should do so. Accordingly we find several decisions to the effect that a stay of proceedings under execution or attachment divests the lien of the writ. *McCamy v. Lawson*, 40 Tenn. (3 Head) 256; *Burks v. Bass*, 7 Ky. (4 Bibb) 338; *Eldridge v. Chambers*, 47 Ky. (8 B. Mon.) 411. Contra besides *Reid v. Lindsey* and cases cited, see *Bond v. Willett*, 31 N. Y. 102, *Freeman v. Dawson*, 110 U. S. 264.

Likewise, that the bond given to obtain an injunction takes the

place of the property held on the execution enjoined and the lien is discharged. *Keith v. Wilson*, 3 Metc. (Ky.) 201; *Barnes v. Baker*, Minor (Ala.) 373; *Lockridge v. Biggerstaff*, 2 Duv. (Ky.) 281, 87 Am. Dec. 498; *Bisbee v. Hall*, 3 Ohio, 449.

But on the other hand it is held that the lien is not divested by the injunction (*Knox v. Randall*, 24 Minn. 479; *Lamorere v. Cox*, 32 La. Ann. 246; *Duckett v. Dalrymple*, 1 Rich. L. (S. C.) 143), and the senior creditor is entitled to the proceeds of a sale under a junior writ, while the injunction was in force (*Lynn v. Gridley*, Walk. (Miss.) 548, 12 Am. Dec. 591, contra *Mitchell v. Anderson*, 1 Hill L. (S. Car.) 69, 26 Am. Dec. 158), provided, of course, a levy had been made under his writ before the injunction issued. *Launtz v. Gross*, 16 Ill. App. 329; *Lynn v. Gridley*, above. But see, *Richards v. Morris C. & B. Co.*, ante, 453.

Thus the conflict is seen to run all along the line, and no reason is perceived why the effect of a stay, injunction, appeal operating as a supersedeas, or a delivery on bond should not each have as much effect on the lien of the execution or attachment as any other of them. Nor do I remember any attempt in any of the cases above cited to distinguish them, but, on the contrary, as in *Rocco v. Parczyk*, the courts frequently argue that one follows from the others. However, this distinction may be seen: In Kentucky the court holds that any of these, in behalf of the judgment debtor, divests the lien, but replevin of the property from the sheriff by a claimant does not, and after judgment against the claimant in the replevin suit the property may, if found, be sold on the original execution. *Ferguson v. Williams*, 3 B. Mon. 302. See also *Street v. Duncan*, Ala. 23 South, 523; *Hagan v. Lucas*, 35 U. S. (10 Peters) 400.

12. HOW THE LIENS MAY BE FORECLOSED.

However regular in itself, the foreclosure may be ineffective by reason of fatal slips in the prior proceedings. The following will be remembered as cases of that kind: *Locke v. Hubbard*, ante, 9; *Windsor v. McVeigh*, ante, 38; *Pennoyer v. Neff*, ante, 48; *Wills v. Chandler*, ante, 186; *Clarke v. Miller*, ante, 267; *Sidwell v. Schumacher*, ante, 278; *Gordon v. Camp*, ante, 296; *McMillan v. Rowe*, ante, 360; and *Singletary v. Carter*, ante, 364. Under this head we inquire as to the effect of various defects in the foreclosure itself, and as to whether it is essential to perfect the title. As to this, read: *Cooper v. Reynolds*, ante, 15; *Allen v. Hall*, ante, 140; and *Singletary v. Carter*, ante, 364.

WILDER v. WEATHERHEAD.

32 Vermont 765. (1860)

**Pursuing Statutory Directions—Importance—Agreements with Debtor
Waiving Compliance—Garnishee Accepting Orders—
Rule as to Other Processes.**

Trustee process by John Wilder against S. E. Weatherhead, principal debtor, and Tyler L. Johnson as his trustee. From judgment against the trustee he appeals. Affirmed.

Johnson, being indebted to Weatherhead, was successively served with trustee process by Weatherhead's creditors in the following order: Jacobs, Gregory, and plaintiff herein. Supposing he was bound to pay the creditors in the order in which their processes were served on him, Johnson immediately accepted Weatherhead's orders on him in favor of Jacobs and Gregory, which he subsequently paid, being to the full amount of their respective claims. These payments he sets up in defense of Wilder's process, with which he was served before accepting the orders. Wilder knew nothing of these orders till they were paid.

George Howe, for the trustee.

E. Kirkland, for plaintiff.

The Court by Barrett, J. * * * The only question to be decided is, whether the payment made by the trustee to Gregory acquits him of liability to be adjudged trustee in favor of the plaintiff in this suit. * * *

The liability of Johnson, as trustee under the process of any of said creditors, could only be perfected and fixed by a final [*767] judgment against both himself and the principal debtor. The right of the several creditors, as between themselves, by virtue of their successive processes, to reach the goods, effects and credits of their debtor in the hands of a third person, as trustee of such debtor, is a matter of strict law, and unless the creditor in the prior process perfects his right against the trustee, by obtaining final judgment that may be enforced in the manner provided by the statute, his process will fail to postpone or defeat the creditors in the subsequent processes in reaching such goods, effects and credits. As the trustee can be charged with liability to any creditor only by force of final judgment obtained under the process, if he volunteers to favor a creditor in a prior process, when several successive processes are pending at the same time, by paying to him the trust fund, or delivering to him the trust property, without such final judgment having been obtained, he does it at the hazard of having to answer upon judgments that the creditors in the subsequent processes may obtain.

The design of the statutes as to trustee process is to enable the interest of the debtor in personal property, and his rights and credits, in the hands of third persons, to be attached and made available by his creditors, in the manner provided in said statute. The rights of creditors, as between themselves, in the use and efficacy of this form of process, stand in strict analogy to their rights under attachments made upon ordinary *mesne* process. The law contemplates that the trustee himself shall be a mere passive stakeholder, yielding only to the compulsive force of final judgment duly obtained by any given creditor or creditors.

The case of *Munger v. Fletcher*, 2 Vt. 524, is not inconsistent with this view. That was an action on the case to recover damage for the misbehavior of the sheriff, in selling property under an arrangement between several successive attaching creditors

before judgments had been obtained. It appeared that he sold it for more than it would have brought if he had kept and sold it upon the executions, when obtained. Such executions were subsequently obtained in due course, and seasonably delivered to the sheriff to charge the property that had been attached and thus sold by him. He applied the proceeds of the property thus sold upon said executions, in the order of their priority, and they were [*768] exhausted before reaching the plaintiff, who was the last of six successive attaching creditors, but was not party to the arrangement under which the sheriff made said sale of the property attached. The court held that as the case showed that the plaintiff had suffered no damage by the course thus taken with the property, he was not entitled to recover.

In the present case the question is, whether the property has been so withdrawn from the trustee's hands by process of law, and in pursuance of its provisions, as to disentitle the plaintiff to claim a judgment for it against the trustee. * * *

As already indicated, a judgment in favor of Gregory against the *trustee*, as well as against the debtor, was necessary in order to perfect his *lien* acquired by the original service of his process, and to give him any right to claim and take the property from the hands of the trustee. As Gregory failed to perfect that *lien* and right, the plaintiff thereupon succeeded to the unobstructed right, by pursuing his suit to judgment, to claim and hold of the trustee the property that had become charged in his hands by the original service of his trustee process.

If it were proper for us to permit a regard for real or supposed equities to countervail the operation of explicit provisions of the statute, and well settled principles and rules of the common law, the trustee in this case might seem entitled to some immunity from his peril of having to pay twice what he was owing to the defendant. But as the law was open before him, and thereby he was entirely safe from such peril, so long as he saw fit to abide by the law, it would hardly be allowable for this court to save him from the consequences of his own improvidence by denying to the plaintiff the rights which the law accords to him. We think the judgment of the county court was right, and it is

Affirmed.

The sheriff who surrenders the attached property to the first attaching creditor upon an assignment of it to him by the attachment defendant in settlement of such creditor's demand, is still liable to the junior creditors for the full value of such property, though it was not equal to the amount of the claim of the first attaching creditor. *Brandon Iron Co. v. Gleason*, 24 Vt. 228.

CAVENAUGH v. JAKEWAY.

1 Walker's Chancery (Michigan) 344. (1844)

Execution Sale—Relief in Equity—Irregularities—Liability of Sheriff.

Bill to set aside a sale on execution. Demurrer sustained.

The Chancellor (Manning). It was the duty of the officer to have sold the lots separately; and, by selling them together, he has probably incurred the penalty given by the fifth section of the act. When several known lots, tracts, or parcels, are levied on, the ninth section requires them to be separately exposed for sale. This, however, is directory merely, and a non-compliance on his part will not make the sale void. The irregularity must be corrected by applying to the court out of which the execution issued, to set the sale aside. Whether the irregularity would affect a purchaser, not a party to the suit, as in the present case; or whether, he being a party, the court would set aside the sale after the two years' redemption had expired, it is not necessary for this court to decide; nor can any such consideration give jurisdiction, where it has none in the first instance. * * *

Demurrer allowed, and bill dismissed with costs.

B. WHAT CONSTITUTES A SATISFACTION.

All, or nearly all, that was said concerning the effect of the use of one writ upon the right to have another (ante, 195-217), might with propriety be said here, and in some texts that topic is treated under this head. Therefore, we will take up the subject here for review, and attention is especially directed to: *Clerk v. Withers*, ante, 191; *Brice v. Carr*, ante, 201, and notes; *Mountney v. Andrews*, ante, 205; and *Green v. Burke*, ante, 205, and notes.

COOPER v. BIGALOW.

1 Cowen (New York) 56. (1823)

Effect of Imprisonment on Capias—Right to Set-Off.

Motion by Cooper that so much of his judgment for \$124.68 against Bigalow and Searls as would be necessary to satisfy the judgment of Bigalow for six cents and costs against said Cooper and one Henry for assault and battery, be set off against said latter judgment. Both causes were in this court.

Wilkes, for the motion.

Foote, contra, objected that the first judgment was satisfied by imprisonment of defendants therein on *ca. sa*.

Per Curiam. The bodies of the defendants, Bigalow and Searls, being in execution, this is, in judgment of law, a satisfaction of the debt. We find this principle perfectly well settled, so much so, that a commission of bankruptcy cannot issue, upon the proof of a debt for which the bankrupt is in execution. *Barnaby's Case*, Strange 653. It is no answer to say that the plaintiff may hereafter be entitled to a new execution, by the death of the defendants. At common law, this could not be done. *Foster v. Jackson*, Hobart 52. But the *statute* makes it an exception. And the case mentioned of a discharge under the insolvent act, is also by statute. We, therefore, deny the motion. Motion denied.

A motion similar to the above was denied, though the defendant taken in execution had died in prison. *Williams v. Evans*, 2 McCord (S. Car.) 123. The motion in *Cooper v. Bigalow* above was renewed at the next term of court, and granted on proof that the prisoners had obtained their discharge from prison under the insolvent act. *Cooper v. Bigalow*, 1 Cowen 206. In England on rule nisi a judgment debtor taken in ca. sa. was released on crediting the amount of the judgment and costs on a larger judgment against the opposite party who had previously been taken and was still held in execution thereon. *Peacock v. Jeffery*, 1 Taunton 426. See also *Simpson v. Hawley*, 1 Maule & Sel. 696. But in a later case, that defendant was in execution, was held, on demurrer, to be a good replication to a plea of set-off on a judgment. *Taylor v. Waters*, 5 Maule & Sel. 103, 2 Chitty 303.

Defendant having died in execution, new execution against his executors on scire facias was denied. *Foster v. Jackson*, Hobart 52; *Williams v. Cutteris*, Croke Jac. 136. These decisions induced the statute, 21 Jac. 1 Ch. 24, by which it was provided that if defendant die in execution the plaintiff may have a new execution.

If the debtor taken in ca. sa. be discharged by agreement, the plaintiff can have no further benefit of his judgment, though the discharge was expressly "without prejudice" to the plaintiff's rights. *Magniac v. Thomson*, 2 Wallace Jr. 209, Fed. Cas. No. 8957; *Cattlin v. Ker-*not, 3 Com. Bench (N. S.) 796, 91 Eng. Com. Law 796.

MUMFORD v. STOCKER.

1 Cowen (New York) 178. (1823)

Motion to enter satisfaction of a judgment because plaintiff had sued thereon and recovered a judgment in the common pleas.

Per Curiam. The motion must be denied. The judgment of the common pleas was not an extinguishment of the judgment here. Both debts are of equal degree. Satisfaction cannot be entered upon motion, on the ground of a recovery in another court, until the judgment there is *in fact* satisfied. Motion denied.

Compare, *Brice v. Carr*, ante, 201, and notes.

HEILIG ET AL. v. LEMLY AND SHAVER, ADM'RS.

74 North Carolina 250, 21 Am. Rep. 489.

Execution—Payment by Sheriff—Right to New Execution.

Motion by plaintiffs for leave to issue execution on a judgment recovered against defendant's intestate and others, on which execution had been issued and delivered to W. A. Walton, sheriff of the county, to be executed. The sheriff having failed to execute the writ before it was spent, paid the amount named in it

to the plaintiffs, all of whom then signed an assignment of the writ endorsed thereon to the sheriff's son, L. W. Walton, for whose benefit this motion is made. From an order granting the motion defendants appeal. Affirmed.

McCorkle & Bailey, for appellants, contended, (1) that there had been no legal assignment of the judgment, and (2) that if otherwise valid the assignment was void on grounds of public policy, being obtained by money of the sheriff.

Battle, Battle & Mordecai, and *J. S. Henderson*, *contra*.

The Court by Rodman, J. The question is whether a sheriff who has made himself liable to a plaintiff by his negligent delay in collecting an execution, and who pays off the debt in his own exoneration and takes an assignment from the plaintiff to a third person in trust for himself, has thereby extinguished the judgment, so that he cannot have an *alias* execution issued to another officer upon it?

The cases cited by the learned counsel for the defendants from New York do certainly establish that, in that state, upon grounds of public policy, the judgment is absolutely extinguished. *Reed v. Pruyn*, 7 Johns. 426; *Sherman v. Boyce*, 15 Johns. 443; *Bigelow v. Provost*, 5 Hill, 566, and others which may be found cited in a note to *Herman on Executions*, 205. Nor is this doctrine confined to New York. It is so held in Alabama: *Roundtree v. Weaver*, 8 Ala., 314; *Boren v. M'Gehee*, 6 Porter, 432; *Crutchfield v. Haynes*, 14 Ala., 49; in Tennessee, *Smith v. Herman*, 1 Cold., 141; but see *Lintz v. Thompson*, 1 Head, 456; in Missouri, *Garth v. McCampbell*, 10 Mo., 154; in Maine and Massachusetts, unless the sheriff takes an assignment from the plaintiff, the judgment [*252] is extinguished, but if he does, it is not. *Whittier v. Heminway*, 22 Me., 238; *Allen v. Holden*, 9 Mass., 133; *Dunn v. Snell*, 15 Mass., 481. So in Georgia, *Arnett v. Cloud*, 2 Ga., 53; and perhaps in some other states.

The foundation of all these cases seems to be that of *Reed v. Pruyn*. In that case the sheriff having a *ca. sa.* against Staats, under which Staats was arrested, procured him and Pruyn to confess a judgment in favor of the plaintiff for a larger sum, and the sheriff paid the amount of the execution to the plaintiff. In

a few days he took out a *ca. sa.* on the judgment confessed by Staats and Pruyn, and took their note for a still larger sum, and gave them a receipt for the amount of the first judgment. Afterwards the sheriff advertised the property of Pruyn and Staats for sale under an execution upon the judgment confessed, and they moved to set aside the execution, and for an entry of satisfaction on the judgment confessed. The court granted the motion, and there can be no doubt was right in doing so.

A sheriff who has an execution against a defendant and as the price of indulgence takes from him a judgment confessed, or a note, for a larger sum, is guilty of oppression and of a breach of official duty, and on grounds of public policy such judgment confessed, or note, must be held void, notwithstanding the sheriff has paid the plaintiff in the original judgment the amount of his claim. And *a fortiori* any acts of the sheriff after he had acquired his interest, under an execution whether issued upon the original judgment confessed, were in like manner void as to the defendant in the execution. This last proposition has long been settled. Bat. Rev. chap. 25, Coroner; chap. 106, Sheriff; *McLeod v. McCall*, 3 Jones L. 87; *Stewart v. Rutherford*, 4 Jones L. 483. And the first we conceive to be equally clear upon general principles. See also Bat. Rev. chap. 106, sec. 17.

Kent, C. J., in delivering the opinion of the court (after citing the cases of *Waller v. Weedale*, Noy. (Eng.) 107; *Langdon v. Wallis*, [*253] E. Lutw. folio, p. 587, Eng. Ed. vol. 1, p. 223; *Speake v. Richards*, Hob. 206, and *Ward v. Hauchet*, 1 Keb. 551), says, "The practice of sheriffs of paying executions themselves, and taking security and judgment bonds from the party over whom they have at the time such means of coercion is to be strictly and vigilantly watched by the courts. Such humanity is imposing, but it may be turned into cruelty. Nothing is more important to the honor of the administration of justice, than that the officers of the court shall not use its process as the means of making unequal bargains, and taking undue advantage. The facts in this case have the appearance of an instance of gross abuse."

He concludes by saying, "I am happy therefore that the sheriff will be driven to seek his remedy upon the note, when the

legality of the increase of the original debt will be open to further investigation."

We think that in the subsequent cases in New York, and in the others elsewhere that have followed this case, the opinion of the eminent judge has been misconceived, and an extension given to it which was not intended, and which cannot be supported by reason. An opinion applicable to a special case, has been converted into a general and arbitrary rule.

In the present case, the sheriff having an execution against the defendant paid it to the plaintiff in his own exoneration and took an assignment on the execution to his son, whether as a trustee for himself, or as a gift to the son, is not material. He now moves that an *alias* execution may issue to his successor in office, for his benefit. There has been no oppression as there clearly was in the case of *Reed v. Pruyn*, and the debt has not been increased.

We are at a loss to conceive what public policy will be violated if the motion is allowed.

It is said that if a sheriff can escape amercement by paying an execution which it was his duty to collect, he will be induced to delay enforcing executions, and creditors may be injured. The creditor cannot be injured if the debt is paid. [*254] And it cannot be a wrong to the debtor if a sheriff who, relying perhaps on his promise to pay the money by the return day, has made himself liable by his indulgence, is allowed after payment to stand in the position of the creditor. If public policy forbids such payments by sheriffs, and for that reason the judgment is extinguished, it would seem that the same principle would forbid any recovery by the sheriff of the money so paid by him. But the principal case we have commented on, holds that the sheriff might sue upon the note which he had taken, and recover what might be just.

It is also said in *Roundtree v. Weaver*, that the sheriff in an action against the defendant can recover the money paid for his benefit. And in *Lintz v. Thompson* it is said that if the sheriff is compelled to pay the debt by a judgment of a court, there is an implied transfer of the plaintiff's debt to him. These cases thus acknowledged that it would be inequitable for a defendant to receive the benefit of the sheriff's payment, and refuse to reimburse

him. It is true that the defendant did not previously request the sheriff to pay the debt, and that in general no one can make himself the creditor of another by officious service, or by officiously paying a debt for him. But where a sheriff, at the express or presumed request of a defendant in execution, indulges him so that the sheriff is compelled to pay the debt, there is a clear equity for reimbursement. The acceptance of the discharge of the original debt by the defendant in execution, may be considered as a ratification of the sheriff's act, and as equivalent to a prior request. It is somewhat like a case where one accepts a draft about to be protested for non-acceptance, for the honor of the drawer. If this equity for reimbursement be admitted as a foundation for an action, why is it illegal and against public policy for the sheriff to take an assignment of the execution, which gives him no more than he would have a right to recover? The form of the recovery is not an essential part [*255] of the equity, and there is no reason why the sheriff should be put to the circuitry of an action.

It has been seen that in Maine and Massachusetts it is held that where the sheriff takes an assignment of the judgment from the plaintiff in execution, the judgment is not extinguished. The decisions in those states support our decision in the present case. We think also that they imply that it is not against public policy for a sheriff to pay off a debt in his own exoneration; for if it were, an assignment would not be sustained.

We concur with the judge below, that the motion should be allowed. Let this opinion be certified.

Per Curiam.

Judgment affirmed.

"If a sheriff shall pay the amount of an execution to discharge himself * * * the defendant may avail himself of such payment to have the judgment satisfied, but he thereby becomes liable to the sheriff for money paid for his use." *Poe v. Dorrah*, 20 Ala. 288, 51 Am. Dec. 196.

In any action of debt for the benefit of the officer against the debtor, it is no defence that the judgment had been paid by the sheriff. *Allen v. Holden*, 9 Mass. 133, 6 Am. Dec. 46.

SOUTHEREN v. REED.

4 Harris and Johnson (Maryland) 307. (1818)

Ejectment in Queen Anne county court by Southeren's lessee against Reed to recover a tract of land called Wilson's Adventure. Defendant pleaded the general issue. On the trial plaintiff showed title through Southeren and defendant showed title by sheriff's sale on a judgment against Southeren, the execution being levied in April, 1802, and indorsed for the use of Wright. Defendant also put in evidence the record of a judgment against said Wright as surety for Southeren on the obligation which was the basis of the judgment against Southeren, and a *fi. fa.* thereon returned paid and satisfied by Wright, May, 1802, satisfaction of the judgment against him being thereupon entered. From judgment for the defendant below plaintiff appeals. Affirmed.

The Court by Johnson, J. * * * No motion was made to quash the execution in the court below. The question for this court to decide is, whether or not on these facts the plaintiff is entitled to recover. The payment made by the surety on the judgment against him, and the subsequent entering of satisfaction, cannot affect the responsibility of the principal debtor. The court consider such a payment, subsequent to the execution being laid, as only operating at law and equity, as an assignment of the judgment against the principal [*310] debtor, and that, therefore, it was strictly correct to carry on the execution for the use of the surety to its full completion. The present is not a new question; the same point was determined on full consideration, in the case of *Norwood v. Norwood*, 2 Harris & J. 238.

Judgment affirmed.

BONES v. AIKEN AND POWELL.

35 Iowa 534. (1872)

Judgments—Assignment to a Defendant—Effect as Satisfaction.

Petition by Bones to restrain the enforcement of judgments against himself and Aiken as partners, recovered after the dissolution of the partnership. Aiken had taken assignments of the judgments and procured executions thereon, which Powell as

sheriff was about to levy on the individual property of Bones. A preliminary injunction was issued, and upon hearing was dissolved as to one of the judgments. Plaintiff appeals. Reversed.

The Court by Miller, J. * * * As ground for dissolving the injunction issued the defendant Aiken showed that in the articles of dissolution of the partnership the plaintiff had agreed to pay the claim of Wellington Bros. & Co. and to release Aiken from his liability thereon, and that plaintiff failed to pay the claim; and under and by virtue of such agreement Aiken claimed that he was but a surety, and as such purchased the judgment and took an assignment thereof. It is urged in argument that as between the plaintiff and Aiken the latter was not liable on the judgment, and could therefore purchase the same as any other person and enforce it against the plaintiff. Appellees' counsel cite no authority in support of this proposition.

On the other hand, it is well settled that at law the payment of a judgment to the plaintiff or owner by one [*536] of several defendants extinguishes it, even though such payment be made by a defendant who is a mere surety. So also an assignment by the plaintiff or owner of the judgment to one of several defendants in the judgment works the same consequence. *The Bank of Salina v. Abbott*, 3 Denio, 181; *Ontario Bank v. Walker*, 1 Hill, 652.

If Aiken be but surety he may, perhaps, on making a proper case, be entitled in equity to be subrogated to the rights of the judgment plaintiffs. But in law the judgment is extinguished, and no execution can issue thereon as such, though Aiken might have an action at law to recover the money paid, based on the plaintiff's agreement.

The judgment being satisfied, the execution was void and conferred no power on the sheriff to levy on plaintiff's property. *The judgment, therefore, must be reversed.*

Cole, J., dissenting. It is apparent from the whole case, and, indeed, it is not controverted, that as between the plaintiff and the defendant Aiken, the plaintiff ought to pay the judgments; that by the terms of their dissolution the plaintiff had agreed to pay the debts for which they were rendered. In equity, then, plaintiff is bound to pay them, and a court of equity would com-

pel him so to do. Now, while in a court of law, the defendant may not have the right to enforce payment by execution (and that is the precise point ruled in the cases cited in the foregoing opinion), yet the plaintiff has brought this action in a court of equity, and asks that court to enjoin the defendant from compelling him to pay a debt, which in equity he ought to pay. In such case the elemental rule is that he who asks equity must himself first do equity. The plaintiff must pay the debt which, in equity, he owes, before he can properly ask a court of equity to interfere. A court of equity will not enjoin legal process, which can [*537] effectuate no injustice. To first enjoin the legal process, and then grant the same relief in equity is a work of supererogation. For this reason I think the judgment should be affirmed.

A perpetual injunction was awarded on similar facts in *Hinton v. Odenkeimer*, 4 Jones Eq. (N. Car.) 406.

The general rule is that when a judgment is recovered against several equally bound to pay, none can make use of the judgment to compel contribution by taking an assignment of it to a third party instead of paying it, *Boyer v. Bolender*, 124 Pa. St. 324; *Allen v. Holden*, 9 Mass. 133, 6 Am. Dec. 46; *Adams v. Drake*, 65 Mass. (11 Cush.) 504; *Stanley v. Nutter*, 16 N. Hamp. 22; *Klippel v. Shields*, 90 Ind. 81; for the assignment operates as a satisfaction. And the same rule was applied against sureties in both of the cases cited in the principal case above, as it has been in many others. *Preslar v. Stallworth*, 37 Ala. 402.

But there are a few cases, some of them due to statutes, sanctioning the use of execution in this way to enforce contribution from co-debtors (*Coffee v. Tevis*, 17 Cal. 239; *Huckaby v. Sasser*, 69 Ga. 603; *Campbell v. Pope*, 96 Mo. 468; *Thornton v. Damm*, 120 Mich. 510, 79 N. W. 797; *Ankeny v. Moffett*, 37 Minn. 109; *Durand v. Trusdell*, 44 N. J. L. 597); or payment by the principal to the surety who has paid. *Harris v. Frank*, 29 Kan. 200; *Giddens v. Williamson*, 65 Ala. 339; *Barringer v. Boyden*, 7 Jones Law (N. Car.) 187; *Harbeck v. Vanderbilt*, 20 N. Y. 395; *Montgomery v. Vickery*, 110 Ind. 211; *Zimmerman v. Gaumer*, 152 Ind. 552. And in case of payment by a surety, if he has no right to execution at law, he is entitled for that very reason to subrogation in equity without taking any assignment. *Dempsey v. Bush*, 18 Ohio St. 376; *Flemming v. Beaver*, 2 Rawle (Pa.) 128, 19 Am. Dec. 629; *McClung v. Beirne*, 10 Leigh (Va.) 394, 34 Am. Dec. 739; *Chandler v. Higgins*, 109 Ill. 602; *Wilson v. Burney*, 9 Neb. 39; *Hayes v. Ward*, 4 Johns. Ch. (N. Y.) 123, 8 Am. Dec. 554.

McCARVER v. NEALEY.

1 G. Greene (Iowa) 360. (1848)

Judgment—Payment—What May be Taken by Sheriff or Attorney.

Bill in equity by Nealey against McCarver, and Todd & Sons, praying for injunction. From a decree granting the injunction as prayed defendants appeal. Modified and affirmed.

The Court by Greene, J. On the 4th of June, 1841, a judgment was rendered against James W. Nealey in favor of Morton M. McCarver, for the sum of \$155.47. On the same day an assignment of it, purporting to be for value received, was made upon the margin of the judgment to Ira Todd and Sons. It appears that Joseph D. Learned, Esq., was the plaintiff's attorney of record. He caused execution to be issued, and thereupon entered into an arrangement with Nealey, by which [*361] he, as attorney, gave him a receipt in full discharge of the judgment. Subsequently Todd and Sons, the judgment assignees, procured the issue of another execution, which was enjoined by the proceeding now before us, upon the complaint of Nealey v. McCarver and Todd & Sons. Upon a full hearing in the district court the injunction was decreed perpetual, and an appeal thereon taken to this court. * * *

It is contended that Learned's authority as attorney of record ceased on the rendition of the judgment; and that he had no right to receive the pay or give a receipt in satisfaction. The practice of Kentucky is referred to in support of this position. It has been the recognized custom, since our first territorial organization, for attorneys to control demands placed in their hands till finally collected. This custom was recognized by an early statute, which conferred the exclusive authority upon the attorney of record for the judgment claimant to enter satisfaction. On obtaining a demand from a client, it is usually specified in the receipt given by the attorney that the demand is taken for collection. This rule has been so generally recognized and adopted in Iowa, that to reverse it might work great [*362] injustice to parties. But it is alleged that, even if he should be regarded as the attorney of McCarver after the rendition of judgment, his authority as such was not transferred to Todd and Sons

after the assignment, unless recognized by them; and that, therefore, the payment of the judgment to him was unauthorized, and should not release Nealey. This conclusion we should recognize as correct, if it appeared that Nealey had received notice of the judgment assignment. Without notice, he should be protected as an innocent party to the transaction.

The testimony of J. W. Nealey, in reply to defendants' interrogatories, discloses that Learned received in payment from him a demand against himself for about fifty dollars, an order on one Russell for an unknown amount, which was paid, and the balance in money.

The principle is not controverted that an attorney has no right to receive anything but money in satisfaction of a demand placed in his hands for collection, unless especially authorized to do so by his client. And it is equally well settled, that if he applies such a claim in payment of his own debts, his client is not bound thereby, and may still proceed against the defendant. *Gullett v. Lewis*, 3 Stew., 23; *Cost v. Genette*, 1 Porter, 212, 34; *Craig v. Ely*, 5 Stew. and Porter, 354; *Tankersley v. Anderson*, 4 Desaus. (S. Car.) 45; *Smock v. Dade*, 5 Rand. (Va.) 639; *Langdon v. Potter*, 13 Mass. 319.

We find it difficult to ascertain the precise amount that Learned, as attorney, received in money on the payment of the judgment. His deposition states that it was settled by setting off a demand which Nealey had against him. From the responsive answer of Nealey, to which, from the state of the testimony before us, we give particular credence, it is rendered quite certain that all but about fifty dollars was paid in money. The order on Russell for cash of Nealey's was paid and should be regarded as so much money in the hands of Learned.

It is therefore our opinion, that Ira Todd and Sons are entitled to recover from James W. Nealey, on the execution, the sum of fifty dollars, and that the injunction be so far dissolved [*363] as to enable the recovery thereof, and rendered perpetual as to the balance of said judgment and execution.

The decree of the district court, declaring the injunction perpetual, will be changed in conformity with this opinion.

The cases are generally in accord with the above. In the following cases the judgment creditors were held bound by payments made to the attorney who recovered the judgments, though no proof of authority to collect was made and the money was never received by the judgment creditors. *Erwin v. Blake*, 33 U. S. (8 Peters) 18; *Wyckoff v. Bergen*, 1 N. J. L. (Coxe) 248; *Black v. Drake*, 2 Colo. 330; *Baltimore & O. Ry. Co. v. Fitzpatrick*, 36 Md. 619; *Gray v. Wass*, 1 Me. 257; *Frazier v. Parks*, 56 Ala. 363. To the same effect see also: *Harper v. Harvey*, 4 W. Va. 539; *Miller v. Scott*, 21 Ark. 396; *Wheeler v. Alderman*, 34 S. Car. 533, 13 S. E. 673.

In *Brackett v. Norton*, 4 Conn. 517, 10 Am. Dec. 179, an attorney sued for services rendered in prosecuting a suit against an officer for neglect of duty in collecting execution on a judgment recovered by plaintiff as attorney for defendant. Plaintiff was allowed to recover for such services without proof of employment except to prosecute the first suit. The authorities on the power of an attorney after recovery of judgment are reviewed at length.

A judgment defendant, having procured an execution to issue against himself, paid the sheriff the amount in state bank paper and received a discharge. The paper proving worthless the plaintiff asked to have the satisfaction set aside which the court allowed, saying:

"It may be of the utmost importance to the plaintiff to know when his execution is in the hands of an officer, that he may give such instructions as are consistent with his rights. He may desire to bid for the property levied on, so as to realize his judgment and prevent the property from being bought in at a sacrifice and his judgment left unpaid. To give to the defendant or any third person the right of controlling an execution without the privity of the plaintiff, would establish a rule full of mischief which might lead to the practice of the grossest fraud" *Osgood v. Brown*, *Freem.* (Miss.) 392.

BANK OF PENNSYLVANIA v. WINGER.

1 Rawle (Pennsylvania) 295, 18 Am. Dec. 633. (1829)

Satisfaction of Judgment by Levy, Sale and Application on Junior Judgment — Rights of Sureties — Effect of Judgment Against Sureties on Character of Their Liability.

Scire facias by Bank of Pennsylvania for use of J. Echelmen and B. Vernor against Jacob Winger and P. Reidebaugh, to revive a judgment in favor of the bank against said W. and R., which had been assigned to said E. and V. From a judgment for defendants plaintiff brings error. Reversed.

The judgment on which this *scire facias* is based was rendered Nov. 27, 1820. Afterward, April 9, 1822, E. recovered a judgment against R. on which *fi. fa.* was issued and satisfied by a

sale of R.'s land. Later, Aug. 29, 1823, the bank assigned its judgment to E. and V., who caused this *sc. fa.* returnable at Nov. Term, 1823, to be issued to revive it. Defendants claim that the bank's judgment was satisfied by the sale of the land under *fi. fa.* on the junior judgment of E. for more than enough to pay it.

Evans & Norris, for plaintiff.

W. Hopkins, for defendants.

The Court by Gibson, C.J. It was long a moot point whether the sale of land on execution would discharge a prior lien; but I believe no one ever suspected that it would discharge the debt. Such a consequence could be produced only by treating the debt and its lien as inseparable. The lien is, however, but a security which may be released either before or after a sale, and, as any other security, without affecting the existence of the debt. By a sale, the purchase money is substituted for the land; and as it is withdrawn from the control of the debtor, and put within that of the lien creditors, I admit that they are bound to look to the application of it, insomuch that a loss of any part of it will have to be borne by him whose act occasioned it: in other words, that the debtor may, in equity and conscience, consider whatever has perished in the hands of the sheriff, as actually paid to him who is entitled to receive it. But can he do so in respect of what has gone into his own pocket, or, what is the same thing, in ease of his debts? It never has been supposed—certainly it never has been decided—that he can. Where a creditor has two funds, we have prevented him from frustrating the lien of another who had but one; yet that could not be done if the rights of the parties were fixed by the sale; for the prior judgment creditor would be paid by operation of law, and before the court could interpose. *Hunt v. Breeding* 12 S. & R. (Pa.) 37, is cited to show that a levy to the value of the debt, is *per se*, satisfaction of the execution on which the levy was made. It would be more to the purpose to show that it discharges other executions which bind the goods. If such were the law, a multitude of cases would necessarily have arisen under it; and the total absence of decision on the subject, is satisfactory evidence that the principle does not exist. Surely a right to priority of payment may be waived without waiving that

of which it is but an accident. A creditor may release the land without releasing the debt; and why not the purchase money, which is in the place of the land? It seems to me he does no more when he waives his preference in favor of those who claim under the debtor by his title subsequent. It is a principle of common sense, which has been embodied as a maxim, that any one may waive a right created for his own benefit. What injury can it do any one? [*303] Surely Reidebaugh, whose proper debt was paid with his own money, could not object to the waiver of preference by the bank; and let us see whether Winger, his co-debtor, has any better right to do so.

Winger and Reidebaugh originally stood in the relation of principal and surety; so that the refusal of the bank to take satisfaction out of the land of the surety, was in furtherance of the equity between the debtors themselves; and to this Reidebaugh, the surety, could not object. But, previous to this, Winger had put into his hands funds to discharge the whole debt, which Reidebaugh misapplied; and the original relation between them, therefore, was, in fact, reversed. But of this the bank was not apprised, and it was therefore justifiable in acting in conformity to the equity of the original relation. It waived its preference in favor of a surety to pursue the principal—the very thing that a court of equity would have compelled it to do. I will not stop to enquire whether the relation of principal and surety is dissolved by a judgment at law, although the negative of the question is sustained by a solemn decision of this court, and there can be no reason why the fixing of the parties at law should absolve the principal from the moral obligation to protect his surety. For the purposes of the argument I will admit that the relation is extinguished. The consequence is that both are principals, and stand in equal equity as between themselves. How then could Winger object to the waiver of its preference by the bank, if Reidebaugh could not? A creditor may collect his debt from either of two principal debtors, or from both, at his election. If then the sale by the sheriff were not payment *per se*, the bank had nothing in its hands but the means of actual payment, which it is not bound to retain in favor of any one but a surety. This principle is well set-

tled both in Pennsylvania and England. *Commonwealth v. Miller's Adm.* 8 S. & R. (Pa.) 452, 457; *Reed v. Garvin*, 12 S. & R. (Pa.) 100, 103. The bank then might well permit the proceeds of Reidebaugh's land to go to his use without injury to Winger, who was in no aspect entitled to be treated as a surety, and who had no other right to object than that of Reidebaugh himself.

Thus far I have considered the question as if it were between the defendants and the bank. The judgment is, however, owned, in part, by Echelman, the plaintiff in the judgment on which Reidebaugh's land was sold; and the question is whether he did not stand in, at least, as favorable a situation as did the bank. * * * [*304] * * * So far was it from being unconscionable in him to possess himself of the means and capacity of the bank, that a court of equity would have given him the benefit of them. "If," says Chancellor Kent, "a creditor has a lien on two parcels of land, and another creditor has a lien, of a younger date, on one of these parcels only, and the prior creditor elects to take his whole demand out of the land on which the junior creditor has a lien, the latter will be entitled either to have the prior creditors thrown upon the other fund, or to have the prior lien assigned to him, and to receive all the aid it can afford." *Cheesebrough v. Millard*, 1 Johns. Ch. 409, 412. * * * It seems to me that, independent of all other considerations, this is decisive in his favor. I am therefore of opinion that the judgment be reversed.

Judgment reversed.

To the same effect see *Barber v. Reynolds*, 44 Cal. 519, where there was a levy under both executions and the first judgment held satisfied only as to creditors holding intermediate liens. Also *Folsom v. Chesley*, 2 N. H. 432.

HAMILTON v. MOONEY.

84 North Carolina 12. (1881)

Distribution of Proceeds of Judicial Sale Among Creditors—Effect of Misapplication on Liability of Surety to Party Denied His Share.

Motion by Sarah Hamilton, judgment creditor, for judgment and execution against Adolphus Mooney as surety on the appeal bond of Robt. Simpson *et al.*, defendants, against whom judgment was rendered on appeal. From an order granting the motion Mooney appeals. Affirmed.

Judgment on the appeal was recovered by plaintiff for \$220, March 25, and execution issued May 3d, and levied with numerous other executions on a stock of goods which the sheriff sold for \$1,496, and turned the proceeds into court. The court awarded plaintiff \$68 out of the fund.

W. J. Montgomery, for plaintiff.

Hoke & Hoke, for defendant.

The Court by Smith, C.J. * * * The defendant denies his liability, alleging that the property levied on was amply sufficient to satisfy the execution, and such was, in law, its effect; and further, that part only of the goods were sold, and the remainder delivered over wrongfully to the assignee in bankruptcy of the said firm, by reason of which, he, the surety, became and is exonerated from all liability upon said undertaking. * * * [*14] * * *

The only matter of law presented in the appeal is the sufficiency of the exception to the ruling, that the goods levied on and surrendered were not a satisfaction of the plaintiff's execution, to the extent that the proceeds of their sale would have been applicable to it.

While a levy of an execution upon the goods of the debtor is a specific appropriation to and discharge of the debt, even when wasted or lost, for the reason that he ought not to be compelled, nor his other property taken, to pay the same debt a second time, yet if the goods have been restored to him, or used in the discharge of his other liabilities, their value does not go in satisfaction of the execution. If this were not so, the same property would discharge two independent debts, and the debtor would be relieved from liabilities in double the amount in value of the property taken. * * *

While the liability of the principal debtor remains unimpaired, when the property is restored to him, or otherwise [*15] used for his benefit, the surety is discharged, whenever the creditor surrenders any lien he has acquired on the property, or other security furnished by the debtor, since the property of the latter, being primarily liable, must be applied in exoneration of the surety. *Smith v. McLeod*, 3 Ired. Eq. 390; *Forbes v. Smith*, 5 Ired. Eq. 369; *Nelson v. Williams*, 2 D. & B. Eq. 118.

But the rule does not apply when the creditor does not participate in the misapplication of the fund, nor in any wise assent thereto. *Kesler v. Linker*, 82 N. C. 456.

The right to proceed against the surety is not forfeited nor postponed, because there is also a right of action against the officer for his misconduct and breach of official duty. The defendant in express terms contracts "that if judgment be rendered against the appellant and execution thereon be returned unsatisfied in whole or in part, he will pay the amount unsatisfied," the precise contingency that has occurred, and there is nothing in the facts set up as a defence to release him from his obligation. * * *

Affirmed.

C. QUESTIONS ARISING AFTER SATISFACTION.

We have already considered the effect of the judgment, and the right to question it, in contests over the property sold in satisfaction of it (*Cooper v. Reynolds*, ante, 15; *Greenvault v. Farmers & Mechanics' Bank*, ante, 24; *Wells v. American Express Co.*, ante, 31; *Pennoyer v. Neff*, ante, 48; *Windsor v. McVeigh*, ante, 38); the effect, in similar contests, of defects in the proceedings after judgment (*Clarke v. Miller*, ante, 267; *Sidwell v. Schumacher*, ante, 278; *Gordon v. Camp*, ante, 296; *Singletary v. Carter*, ante, 364; *Wilder v. Weatherhead*, ante, 484; *Cavenaugh v. Jakeway*, ante, 487); the right to have the judgment opened and the contest tried over after satisfaction made (*Bronson v. Schulten*, ante, 103); and the right to try the same questions again in other proceedings in disregard of the prior judgment (ante, 109-135). Our object in the present inquiry is to consider questions arising out of the act of making satisfaction.

PIPER v. ELWOOD.

4 Denio (New York) 165. (1847)

Action on Judgment—Effect of Satisfaction by Purchase of Property on Execution Sale—Proof of Recovery, Effect—Court's Power to Set Aside Satisfaction and Give New Writ.

Action in justice court by Elwood against Piper on a judgment of a justice of the peace. From judgment of the court of common pleas on *certiorari* affirming the judgment of the justice in favor of plaintiff, defendant brings error. Affirmed.

Defendant claimed the judgment sued on was satisfied, as it appeared that an execution was issued thereon and levied on defendant's horse, which was sold by the constable for enough to satisfy the execution, and it was returned satisfied. But plaintiff

showed that defendant had sued him and recovered the value of the horse because it was exempt from execution.

V. Owen, for Piper.

James Hyde, for Elwood.

The Court by Bronson, C.J. The defendant defeated the effect of the levy and sale, by suing for and recovering the value of the property. The first judgment thereupon revived, and might be enforced. If the judgment had been in a court of record, the plaintiff would have been allowed to amend or strike out the return on the execution, and to have a new execution. *Adams v. Smith*, 5 Cowen, 280. As the justice had no power to order such an amendment, an action on the judgment was the appropriate remedy.

Judgment affirmed.

Debt has been sustained on a judgment of a justice of the peace, though execution had been issued thereon, and the constable's return showed levy and satisfaction. Parol evidence was held competent in such action to show that the return was false. *Hutchinson v. Greenbush*, 30 Me. 450.

In Texas debt on judgment of a court of record satisfied by sale of land on execution was sustained on proof that the levy and sale were fatally defective. *Townsend v. Smith*, 20 Tex. 465, 70 Am. Dec. 400. Debt on judgment after levy of execution under it held not maintainable where defendant's title was perfect, but plaintiff failed to record the levy. *Lawrence v. Pond*, 17 Mass. 433. Entry of satisfaction being conclusive in all collateral proceedings, held that debt would not lie, but only scire facias or the like. *Pratt v. Jones*, 22 Vt. 341; *Grosvenor v. Chesley*, 48 Me. 369.

HUGHES v. STREETER.

24 Illinois 647, 76 Am. Dec. 777. (1860)

Execution on Judgment Satisfied of Record—Power of Clerk to vacate Satisfaction and Award New Writ—Levy on Land, Sufficiency of Indorsement to Identify.

Motion by John Hughes to quash an execution on a judgment against him in favor of Samuel Streeter, on which a previous execution had been returned: "Made * * * the amount of this judgment interest and costs." From order denying the motion, Hughes brings error. Reversed.

Scates, McAllister & Jewett, for plaintiff in error.

Smith & Dewey, for defendant in error.

The Court by Walker, J. The rule has been uniform both in this country and Great Britain, that after a satisfaction of a judgment by the sale of property, no further execution can issue upon the judgment, until the satisfaction is vacated, the levy and sale set aside, and an execution awarded by an order of the court in which the judgment was rendered. No case has been referred to, and none is believed to exist, in which a clerk has ever before issued an execution on a judgment thus satisfied. And it is for the plain and manifest reason, that his duties are only ministerial, while the setting aside a levy, or a sale, or the vacating the entry of satisfaction of a judgment, is a judicial act. When the plaintiff has sold property in satisfaction, his judgment ceases to exist, and when the record entry of its satisfaction is vacated, it is thereby revived, and receives new vitality. The exercise alone of a judicial power, equal to that which first made the decision, can impart this new life to a judgment which has once been satisfied by an officer or person clothed with power to make the entry. The hearing the evidence and finding the facts on the motion, is as purely judicial, as is the ascertaining the amount of the indebtedness, and rendering the judgment in the first place. The clerk might as well assume the one jurisdiction as the other, and the exercise of either is wholly unwarranted.

We have, however, been referred to the case of the *Frankfort Bank v. Markley*, 1 Dana (Ky.) 373, as an authority to sustain the practice. That was a case where an agent of plaintiff, through mistake, entered a credit on the execution, and the clerk issued an alias for the full amount of the judgment. That case stands, so far as we can find, solitary and alone, and no rule of law is referred to in support of the authority of the clerk, and the court, in the opinion, very properly discourages the practice. The facts of that case are not the same as in this, and even if they were, we should not be inclined to follow it as a precedent, or as authority, since we believe that it is opposed to the uniform practice, and is not sanctioned by the common law, is unauthorized by statute and in violation of our constitution, which has vested all judicial power in courts, and [*650] not in ministerial officers. We are therefore clearly of the opinion that the court erred in not quashing the *alias* execution, as

its issue was not warranted until the satisfaction, the levy and sale, had been set aside by the judgment of a court of competent jurisdiction.

The question will necessarily arise on another trial, whether the levy and sale made under the first execution should be set aside. * * * *A part of eighty acres, containing seventy-four acres, more or less*, is wholly insufficient to designate any tract of land, that can be located. By this description it might be located in a large number of different modes, either of which would equally answer the call of the deed. It is true, that it is seventy-four acres in a designated eighty-acre tract. But whether on the one or another of the sides, in the center or in one of the angles of the tract, it is impossible to know. There is nothing in the levy and certificate of purchase from which that fact can be ascertained, and we have no other means, which we can recognize, of ascertaining the intention of the parties. Whether the half of the quarter section is fractional, does not appear. But even if it did appear that he owned seventy-four acres by an appropriate description, there is nothing in the levy to limit and designate the portion of the half of the quarter that he owned. Had it stated that it was all of the land which he owned in the tract, or that it was all of the land he has acquired by purchase from a particular individual, or some such reference to something else, by which it could have been located, it might have been sufficient. But we have no such reference, and we have no doubt that the description is so defective that no title whatever passed by the sale. This being the case, the defendant in error did not obtain anything by his purchase, and has an equitable right to have the levy and sale set aside, and an execution awarded by which he may acquire the benefit of his judgment.

The judgment of the court below is reversed, and the cause remanded.

Judgment reversed.

On the first point, to the same effect, *Haden v. Walker*, 5 Ala. 86; *Tudor v. Taylor*, 26 Vt. 444.

The decision in *Richardson v. McDougall*, 19 Wend. (N. Y.) 80, to the effect that new execution on a satisfied judgment may issue without any order of court, if the property sold proves not to belong to the judgment debtor, is clearly induced by admission of counsel and with-

out reflection, for Cowen, J., says: "It is not denied that execution might well have issued had it not been for the *sci. fa.*"

Numerous decisions to the same effect as to the sufficiency of the description are cited in Freeman, Ex. § 330.

WATSON v. REISSIG.

24 Illinois 282, 76 Am. Dec. 746. (1860)

**Judgments—Power of Courts Over Their Processes—How Exercised—
Power to Set Aside Satisfaction—Property Liable to
Process, Right of Redemption.**

Motion by Charles Reissig to set aside and vacate an entry of satisfaction of a judgment in his favor against Alonzo Watson. From an order granting the motion defendant brings error. Affirmed.

The satisfaction was entered on return of execution on the judgment, stating that lots two and three of Wheaton's Addition to the town of Wheaton had been levied thereon and sold to the plaintiff in the judgment for the amount of the judgment and costs.

Mather, Taft & King, for Watson.

Coventry & Rountree, for Reissig.

The Court by Caton, C. J. The law is too well settled to admit of discussion, that a court of law may exercise an equitable jurisdiction over the execution of its own judgments and process, but it does not follow that it will always exercise such jurisdiction, and indeed it will refrain from doing so, when from any circumstance, it cannot do as complete justice as a court of equity, but will leave the parties to seek relief in that court. We shall see whether this record presented such a case as justified the court of law in exercising such an equitable jurisdiction. *** [*285] *** The facts may be stated in a very few words. The property had been previously sold on the Savage execution, and there only remained in the judgment debtor a right of redemption. This was levied upon and sold by virtue of this execution, and bid in by, or for, the judgment creditor, and upon that bid and for that consideration, satisfaction of the judgment and execution was entered. And whether this sale and satisfaction should be set aside, was the real question to be determined.

In the case of *Merry v. Bostwick*, 13 Ill. 398, it was decided

by this court, for reasons which we think entirely satisfactory, that the right of redemption which is by our statute vested in the judgment debtor for twelve months after a sale of real estate under a decree or an execution, is not subject to be levied upon and sold, by virtue of another execution against the judgment debtor. Hence this levy and sale conferred no right or title to the purchaser. It was entirely void, and the satisfaction was entered without any shadow of consideration whatever. In such a case it was not only proper, but it was the duty of the court to set aside, or vacate the entry of satisfaction, and to issue another execution under which the judgment creditor might redeem from any sale where the law would permit it, or otherwise seek a real satisfaction of his judgment.

The order of the court below is affirmed.

Order affirmed.

In other states it has been held that the debtor's right of redemption is an interest liable to levy and sale on an execution or attachment against him. *Curtis v. Millard & Co.*, 14 Iowa 128, 81 Am. Dec. 460; *Herndon v. Pickard*, 73 Tenn. (5 Lea) 703.

FREEMAN v. CALDWELL.

10 Watts (Pennsylvania) 9. (1840)

Judgments—Setting Aside Satisfaction and Awarding New Writ—Warranty in Judicial Sales—Right to New Execution on Failure of Title—Statute 32 Hen. VIII.

Scire facias by James D. Caldwell against Brewster Freeman, to obtain execution on a judgment against said Freeman, which had been satisfied by a sale to plaintiff on *fi. fa.* of cattle which turned out not to belong to Freeman and were afterward replevined by the owners. From an order granting new execution defendant brings error. Reversed.

Armstrong and Campbell, for appellant.

Parsons and Greenough, contra.

The Court by Gibson, C. J. In judicial sales there is no warranty. The principle is universal, but particularly recognized by us in judicial sales of land, which we treat as a chattel for payment of debts; and it is of course equally applicable to the judicial sale of a chattel pure. What interest in it does the sheriff propose to

sell? Not a title to it, but the debtor's property in it, whatever it may be; and the vendee, where the thing has been recovered from him, has no recourse to the price of it in the hands of the sheriff or the creditor's pocket. In the case of *The Monte Allegre*, 9 Wheat. 616, it was ruled that a loss sustained by the marshal's vendee of a rotten article, sold by a sample with which it did not correspond, should not be made good out of the proceeds in court. Why shall not the same principle be applied to a purchase by the judgment creditor himself? By his bid he may have prevented a sale to a stranger who could have had recourse to no one; and thus have deprived the debtor of the benefit of his doubtful title, which may have been a legitimate subject of value. In the one case and in the other, the produce of it has, in contemplation of law, been brought into court and distributed; and the matter has consequently passed *in rem judicatam*. * * * [*12]

Before the 32 Hen. VIII, there was no re-extent upon an eviction of a tenant by *elegit*. "*Nota*," says Lord Coke, 2nd Inst. vol. 1 p. 190, *a*, "it appears by the preamble of the said act, and by divers books, that after a full and perfect execution had by *elegit* returned and of record, there never shall be any re-extent on any eviction, but if the extent be insufficient at law, there may go out a new extent." Here then is distinctly announced the common law principle which rules the case; and though it has been abrogated in England, so far as regards land, there is no statute on the subject in Pennsylvania. The silence of the repealing act as to chattels, was imputed by Mr. Justice Woodbury, in *Whiting v. Bradley*, 2 N. H. 79, to a supposition that creditors could, even then, have a new execution of everything but land; but it is plain, from the special provision of the statute in that case, that the legislature of his own state thought otherwise. Indeed, the statute *Westm. 2*, which gave the writ of *elegit*, had put land and chattels on a footing in all respects, except the relative quantity which might be levied of each, and the manner of its application to purposes of satisfaction; and it is probable, the reason why the latter were not included in the 32 Hen. VIII, was that the progress of trade had not involved the title to things personal, so frequently in complication and doubt, as to cause much inconvenience from it. * * *

Without power derived from a statute, therefore, I take it that [*13] execution can not be repeated; and though this clear common law principle may be violated, it can not be evaded. It is among the worst symptoms of the judicial epidemic of our day, that the bent of the professional mind is towards oral testimony in preference to record and written proofs. What motive could there be, were it allowable on principle, to overturn the record in this instance? The plaintiff's case may be thought a hard one; but it is not more so than would be the case of a stranger, and to say that every sheriff's vendee who is deprived of the property by title paramount, shall have his money again, would destroy all confidence in the stability of judicial sales. He takes upon him a risk which may lead to his disadvantage; but he does so at the premium of a reduced price. Were it not for this risk, a plaintiff might safely depreciate the defendant's title, and buy it in at a sacrifice. If it proved good, he would have it at an undervalue; but if bad, he would be only where he began. His interest, instead of being promoted by a sale for an outside price, would be to have the property sacrificed; and it is impolitic to encourage a principle which would make him a speculator. In this respect, an advantage over the other creditors would be, not only unjust to them, but ruinous to the debtor. On grounds of reason and authority, therefore, he ought to stand as any other purchaser.

Judgment reversed.

This is the case usually cited by those who maintain this view, and it fairly represents their argument. To the same effect see *Vattier v. Lytle*, 6 Ohio, 482; *Thomas v. Glazener*, 90 Ala. 537, 8 South, 153, 24 Am. St. Rep. 830; *Halcombe v. Loudermilk*, 3 Jones (N. C.) 491; and *Jones v. Burr*, 5 Strobb. (S. Car.), 147, same case 53 Am. Dec. 699, in a note to which Mr. Freeman reviews a large number of decisions. In his work on executions he says: "Upon this question the authorities are clearly irreconcilable." *Freeman Ex.* § 54. But from the following cases the clear weight of authority, and as it seems to me of reason also, will be seen to be against *Freeman v. Caldwell*. In many states a remedy is given by statute. But let us review the decisions not depending upon statute.

In the following cases satisfaction was set aside and a new execution given because the property sold subject to a mortgage was worth less than the incumbrance. *Kimports v. Oberholtzer*, Iowa, 82 N. W. 1012; *Osborne v. Miller*, 37 Minn. 8, 32 N. W. 786; *Hollon v. Hale*, Tex. Civ. App., 51 S. W. 900.

In Connecticut payment being compelled under a levy after the return day of the writ and satisfaction entered, the judgment was revived on *scire facias* on proof that defendant had recovered the amount paid. *Stoyel v. Cady*, 4 Day (Conn.) 222. In a later case debt on judgment was sustained though the judgment had been satisfied by levy on land of a stranger, the creditor who purchased at the sale supposing defendant's conveyance to be fraudulent. "In this state the ancient English common law rule has never been adopted; but the practice has uniformly been in conformity with the principle that where there is no real, but only an apparent satisfaction of the execution issued on a judgment, by reason of a mistaken or fruitless levy on lands, debt on judgment, as well as *scire facias*, may be brought to obtain satisfaction." *Cowles v. Bacon*, 21 Conn. 451, 56 Am. Dec. 371.

In the following cases satisfaction produced by a sale of property which proved not to belong to the judgment debtor was set aside and a new execution on the judgment awarded on *scire facias* or motion. *Adams v. Smith*, 5 Cowen (N. Y.) 280; *Magwire v. Marks*, 28 Mo. 193, 75 Am. Dec. 121; *Ritter v. Henshaw*, 7 Iowa, 97; *Cross v. Zane*, 47 Cal. 602; and in *Tudor v. Taylor*, 26 Vt. 444, the right to new execution on proof of failure of title and the power of the court to set aside the satisfaction were asserted, but the new execution was denied because a presumption of actual payment arose from the delay for 30 years after satisfaction was entered before the motion was made that satisfaction be set aside. The propriety of such action is also asserted in *Whiting v. Bradley*, 2 N. H. 79.

The supreme court of Ohio having followed *Freeman v. Caldwell* in *Vattier v. Lytle*, 6 Ohio, 478, held that it was no defense to a bill to foreclose a mortgage that the debt thereby secured had been reduced to judgment and the judgment satisfied by a sale on execution of the mortgaged land which the debtor had sold after the mortgage was recorded but before the levy was made. *Hollister v. Dillon*, 4 Ohio St. 198. There are several cases in which a judgment creditor has been given a decree in equity for the amount of his judgment when defendant's title to the property sold plaintiff on execution to satisfy the judgment has failed. *Warner v. Helm*, 6 Ill. (1 Gil.) 220; *Price v. Boyd*, 1 Dana (Ky.) 434; *M'Ghee v. Ellis*, 4 Littell (Ky.) 244, 14 Am. Dec. 124. In *Howard v. North*, 5 Tex. 290, which was a suit to recover land because the sale of it on execution was defective, *Hemphill, C.J.*, in behalf of the court, in an elaborate opinion maintained the right of the purchaser under the execution to retain it till the amount paid by him to defendant's use had been refunded. To same effect see *Meher v. Cole*, 50 Ark. 361.

Caveat Emptor. It cannot be disputed that caveat emptor applies to all purchasers at judicial sales as stated by *Gibson, C.J.* That is to say, there is no implied warranty either of quality or title by either the judgment debtor, judgment creditor or the officer making the sale. If the quality is deficient it is the purchaser's loss, as was held in the case cited by *Gibson, C.J.*, above. If a stranger has purchased at the

sale and title has failed, clearly he can have no recourse to the judgment creditor (*England v. Clark*, 5 Ill. [4 Scam.] 486; *Dunn v. Frazier*, 8 Blackf. [Ind.] 432), nor against the officer making the sale. The officer has done what he was bound to do and no more, and no implied warranty of anything can be imputed to him. And as to the judgment creditor the execution, which is said to be the end of the law, would be of little use to him and a dangerous thing if he were liable to an implied warranty of the property sold on it. It has even been held that the person buying cannot resist payment of the amount of his bid on the ground that defendant had no title and therefore the consideration had failed, for he purchased only a quitclaim. *M'Ghee v. Ellis*, 4 Litt. (Ky.) 244, 14 Am. Dec. 124; *Farmers' Bank v. Peter*, 76 Ky. (13 Bush) 591; *Humphrey v. Wade*, 84 Ky. 391; *Cameron v. Logan*, 8 Iowa 434; *Contra, Julian v. Beal*, 26 Ind. 220, 89 Am. Dec. 460. If the money is in the hands of the clerk he cannot have it back. *Dunn v. Frazier*, 8 Blackf. (Ind.) 432.

Right of Purchaser to Reimbursement.—But although there is no implied warranty by the defendant in the execution it does not follow that he is not bound to pay the purchaser the amount he has paid and which has gone to satisfy the defendant's debts. Accordingly we find numerous decisions to the effect that one who, being a stranger to the proceedings, has paid money at an execution sale for property which did not belong to the defendant in the execution, may recover the amount in an action against the judgment debtor either at law or in equity, though no fraud is imputed to him. *Preston v. Harrison*, 9 Ind. 1; *McLaughlin v. Daniel*, 8 Dana (Ky.) 182; *Johnson v. Caldwell*, 38 Tex. 218; *McLean v. Martin*, 45 Mo. 393.

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